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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN/KOREA, *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814 (1976), provides that the Federal Maritime Commission:

> shall disapprove any [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. . . .

The question presented is whether the Commission is authorized by Section 15 to promulgate general regulations prescribing in advance a detailed self-policing system which all conferences, foreign and domestic, must adopt, including, *inter alia*, a provision requiring every conference to make records of its policing activities available to the Commission—a power of compulsory disclosure that Congress had withheld from the Commission in order to avoid the risk of endangering the continued viability of the conference system and the friendly relations of the United States with other maritime nations.

REFERENCE TO PARTIES BELOW

The following conferences and rate agreements were parties to the proceedings below:

Trans-Pacific Freight Conference of Japan/Korea
Japan/Korea-Atlantic and Gulf Freight Conference
Japan-Puerto Rico & Virgin Islands Freight Conference
Far East Conference
Pacific Westbound Conference
Agreement No. 10107
Agreement No. 10108
New York Freight Bureau
Trans-Pacific Freight Conference (Hong Kong)
Philippines North America Conference

Atlantic & Gulf-Singapore, Malaya and Thailand Conference
Atlantic & Gulf Indonesia Conference
Pacific Indonesian Conference
Pacific Straits Conference
Thailand/U.S. Atlantic & Gulf Conference
Thailand-Pacific Freight Conference
Deli-New York Rate Agreement
Deli/Pacific Rate Agreement
Java/New York Rate Agreement
Java/Pacific Rate Agreement
India, Pakistan, Ceylon & Burma/West Coast United States Rate Agreement
Trans-Pacific American-Flag Berth Operators Agreement
West Coast United States & Canada/India, Pakistan, Ceylon & Burma Rate Agreement
Straits/New York Conference
Malaysia-Pacific Rate Agreement

The following were intervenors in the proceedings below:

Latin America/Pacific Coast Steamship Conference
Pacific Coast/River Plate, Brazil Conference
Pacific Coast/Australasian Tariff Bureau
Gulf-Mediterranean Ports Conference
Australia/Eastern U.S.A. Shipping Conference "8900" Lines
Iberian/U.S. North Atlantic Westbound Freight Conference
Marseilles North Atlantic U.S.A. Freight Conference
Med-Gulf Conference
Mediterranean-North Pacific Coast Freight Conference
New Zealand Rate Agreement
North Atlantic Mediterranean Freight Conference

South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement
Spanish Eastbound Freight Agreement
U.S. Atlantic & Gulf/Australia-New Zealand Conference
West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference

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OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported, is reproduced as Petitioners' Appendix A ("Pet. App."), *infra*, pp. 1a-64a. The order of the Court of Appeals, entered on October 31, 1980, denying rehearing is reproduced as Petitioners' Appendix B, *infra*, p. 65a.

The orders of the Federal Maritime Commission are as follows:

(1) General Order 7, Docket 73-64, Notice of Proposed Rulemaking, October 17, 1973 (Pet. App. C, *infra*, pp. 69a-79a);

(2) General Order 7, Docket 73-64, Final Rule, April 18, 1978 (Pet. App. D, *infra*, pp. 80a-105a);

(3) General Order 7, Docket 73-64, Reconsideration and Modification of Final Rules, September 14, 1978 (Pet. App. E, *infra*, pp. 106a-134a);

(4) General Order 7, Docket 73-64, Affirmance of Final Rules, December 18, 1978.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 11, 1980. A petition for rehearing was denied on October 31, 1980. On January 23, 1981, Chief Justice Burger extended the time to file a petition for certiorari to February 9, 1981. (Pet. App. F, *infra*, p. 135a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814 (1976), is reproduced as Petitioners' Appendix G, *infra*, pp. 136a-137a.

46 C.F.R. Part 528 is reproduced as Petitioners' Appendix H, *infra*, pp. 138a-145a.

STATEMENT OF THE CASE

Petitioners are international shipping conferences and rate agreements composed of both domestic and foreign carriers which operate between various United States and

foreign ports.[1] These voluntary associations set transportation rates and establish rules, regulations and self-policing mechanisms to provide dependable ocean carrier service at relatively stable rates. The agreements pursuant to which petitioners operate are approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814, and are thereby exempted from the antitrust laws of the United States.

Under Section 15 of the Shipping Act, as amended in 1961, the Commission is authorized to disapprove a conference agreement "after notice and hearing, on a finding of inadequate policing of the obligations under it. . . ." In 1967, the Commission promulgated general regulations under Section 15 requiring conference agreements to contain a description of the method used to police the agreement and requiring conferences to submit semi-annual reports to the Commission concerning their policing activities. 46 C.F.R. §528 (1967 Supp.). These regulations were upheld in *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967).

The Commission has never instituted a proceeding to disapprove an agreement based on a conference's failure to adequately police its obligations.

In October 1973, the Commission issued a notice of proposed rulemaking, spelling out in precise detail a uniform, mandatory system of self-policing requirements applicable to all conferences and other rate-fixing agreements between shipping carriers in foreign and domestic commerce. Section 528.2 of the proposed rules required

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[1] Petitioners' members are set forth as Petitioners' Appendix I, *infra*, pp. 146a-152a.

every self-policing system to engage an outside agency to "constantly police" the activities of the conference's members through inspection of books and records, "surprise audits" and other specified measures, including requiring conference members and their associates to produce their records, wherever located, to the outside agency. This section also required every self-policing system to provide, upon request, a copy of all records of self-policing activities to the Commission or any other appropriate governmental body, but that the names of the parties involved could be deleted. However, Section 528.4 provided for coded identification of all parties to self-policing investigations.

Numerous groups, including petitioners, filed comments opposing the proposed rules. The Commission's Bureau of Hearing Counsel urged that the provision requiring production of records of self-policing activities be deleted because it could not be enforced against conferences headquartered outside the United States. The Bureau noted that a similar provision had been deleted from the 1961 amendments to the Shipping Act.[2]

The Commission did not act on the proposed rules until April 1978, when it issued a so-called "Final Rule" eliminating altogether the requirement of furnishing records of self-policing activities to the Commission. However, the provision requiring conferences and rate agreements to establish an outside policing agency was retained.

Again, numerous petitions for reconsideration of the "Final Rule" were filed by conferences and rate agreements. On September 14, 1978, the Commission issued a "Reconsideration and Modification of Final Rules" revis-

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[2]JA below at 183.

ing the April rules in several significant respects. Although the requirement for an outside policing body was retained, the final version of the rules harked back to the 1973 proposal by requiring conferences to delete from their agreements all confidentiality provisions protecting members from orders by the Commission for production of self-policing information and data. The policy statement accompanying the rules announced a new Commission intention to use the self-policing data in collateral enforcement of the Shipping Act. The rules also substantially increased the record-keeping obligations of the policing bodies. On December 18, 1978, the Commission denied requests for reconsideration and issued its "Affirmance of Final Rules."[3]

On appeal pursuant to 28 U.S.C. §2342, petitioners contended that the rules were unauthorized by Section 15 of the Shipping Act and were promulgated in violation of the Administrative Procedure Act, 5 U.S.C. §§551-706. On September 11, 1980, with Judge Markey dissenting, the Court of Appeals upheld the regulations.[4]

REASONS FOR GRANTING THE WRIT

As Judge Markey stated in his dissent, the important question presented by this case is whether, in issuing the general rules imposing self-policing requirements upon

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[3]On October 15, 1978, a dissenting opinion was filed by Commissioner Karl E. Bakke. JA below at 780-806.

[4]In a separate proceeding to enforce the self-policing rules, the Commission entered an order on October 17, 1979, dissolving nine conferences on the ground that their conference agreements did not contain the self-policing provisions required by the rules. An appeal from that order is now pending. *Deli/New York Rate Agreement v. Federal Maritime Commission*, No. 79-2332 (D.C. Cir. 1979).

foreign and domestic carriers, the Commission acted "directly contrary to congressional limitations on its authority." (Pet. App. A, *infra*, p. 50a.) The resolution of this question is of great importance to the international shipping community, and affects not only the continued viability of the conference system but also the relations of the United States with friendly maritime nations.

In Section 15 of the Shipping Act, 1916, Congress conditioned the continued legality of conference agreements upon adequate *self*-policing, not upon policing by the Federal Maritime Commission. The selection of a self-policing system—in which the Commission's oversight role was expressly limited to its disapproval of a conference agreement in individual cases "after notice and hearing, on a finding of inadequate policing of the obligations under it"—was deliberate. Congress was acutely aware when it enacted Section 15 that excessive governmental regulation would be regarded by foreign carriers and nations as an unwarranted interference in their internal affairs. The Commission's self-policing requirements represent an end-run around the statute, an exercise of regulatory powers withheld by Congress for fear of jeopardizing the conference system.

The rules impose sweeping, mandatory obligations on multinational shipping conferences, including disclosure of sensitive self-policing documents, that would eliminate the flexibility and the confidentiality that are at the heart of the conferences' self-policing systems. By assuming regulatory powers deliberately withheld by Congress, the Commission's actions threaten to destroy the conference system altogether by precipitating the withdrawal of

foreign carriers opposed to unauthorized intrusion of the Commission into the self-policing process.[5]

1. Congress Recognized that Excessive Unilateral Regulation of Foreign Carriers by the United States Risks Destruction of the Conference System and Endangers Friendly Foreign Relations.

Congress approved the conference system because it believed that the "competitive rigors" of ocean shipping, if unleashed, "almost invariably . . . destroy the requisite dependability, regularity and nondiscriminatory nature of ocean common carriage." S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 3108, 3110-11. Accordingly, in the Shipping Act of 1916, Congress immunized the conferences from the antitrust laws in exchange for the stable service, uniform rates and protection of economically weaker American-flag lines that the conferences provide.

However, Congress has consistently recognized that the fragile, multinational character of shipping conferences imposes a limit on the power of one government to dictate conference obligations. Foreign carriers and foreign governments, whose cooperation is essential to the conference system, have repeatedly resisted attempts by

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[5] Following meetings held in Tokyo during the week of January 19, 1981, five members of petitioner Philippines North America Conference, being unwilling to comply with the regulations, submitted their resignations from the Conference. This, in turn, has had a spiraling effect, prompting the resignations of two other Conference members. Also because of the regulations, there have been resignations by members of petitioners Straits/New York Conference and Atlantic & Gulf Indonesia Conference.

the United States to interfere in the policing of conference agreements and, in particular, to compel disclosure of sensitive documents maintained by shipping lines and their associates.[6] The provisions of the Shipping Act have been shaped by Congress's perception of the need to balance, on the one hand, the interest in maximum effective enforcement of conference obligations and, on the other, the concern of conference members to protect confidential internal records from the reach of a foreign government.

Nowhere was this need for a delicate accommodation of competing interests more recognized by Congress than in the 1961 amendments to the Shipping Act. While concerned with sanctioning conference agreements providing for dual rates found illegal in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), Congress also amended Section 15 to define and limit the authority of the Commission to oversee self-policing systems. The Senate Report accompanying the final bill warned of the "major deleterious effects and negligible counterbalancing benefits" that would accompany "further unilateral attempts by this Government to regulate the details of commercial transactions of shippers and carriers which take place and are documented abroad . . . ." S. Rep. No. 860, 87th Cong., 1st Sess.,

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[6] "Associates" of conference members are defined by Section 528.1(a) of the rules to include all "persons, firms, associations, or corporations that are agents, employees or affiliates of members, or are otherwise subject to the control of a member, or which themselves control a member, or are commonly controlled by any person, firm, association or corporation which controls a member. . . ." A number of American members are owned by conglomerates, such as LTV and R.J. Reynolds Industries, whose records are therefore subject to the sweep of the regulations.

reprinted in [1961] U.S. Code Cong. & Ad. News at 3110. Such efforts, the Report noted:

> are likely to create further resentment among our foreign friends and, as a consequence, to cause reactions ranging from passive loss of confidence to active retaliation in foreign ports. In the process, they might well force foreign lines out of conferences, thereby destroying conferences and placing the high-cost American operator, even if subsidized, at a serious if not impossible competitive disadvantage.

Id. The Report also emphasized that, to the extent such extraterritorial regulation could not be as effectively enforced against foreign flag lines as against their American competitors, "we would be working at serious cross-purposes with fundamental precepts of national maritime policy." *Id.*

Congress's preference for self-policing was therefore dictated by the potentially destructive effect of unilateral governmental regulation of this cooperative, multinational system. In order to ensure the well-being of the system, with its large benefits to American shipping, Congress opted for less than all-out Commission regulation. It provided the Commission with enforcement powers that were explicitly limited and more narrow than those the agency had sought.

2. Congress Withheld From the Commission the Regulatory Powers at Issue Here.

Congress deliberately decided not to authorize the Commission to prescribe in advance the details of conference self-policing or to have access to the records and documents of conferences' self-policing bodies. The

language and legislative history of Section 15 leave no doubt that Congress withheld these powers from the Commission because it feared the damage that would be done to the conference system.

a. Section 15 of the Shipping Act

Section 15 provides, in pertinent part, that

> The Commission shall disapprove any [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it . . . .

As Judge Markey noted in dissent, Section 15 does not authorize the Commission "to prescribe in advance the precise kind of policing system all must adopt and the specific, detailed manner of operating that prescribed system." (Pet. App. A, *infra*, p. 52a.) On the contrary, the language reflects the allocation of authority made by Congress, namely that responsiblity for policing a conference agreement rests with each conference and responsiblity for determining whether obligations under the agreement have been adequately policed rests with the Commission.

The challenged regulations cross over the line drawn by Congress and violate the concept of conference self-policing. Even if a conference is *in fact* adequately policing its members, that fact is irrelevant under the regulations if the conference agreement does not contain each and every one of the numerous requirements specified by the Commission. These obligations take no account of the different size, stability or trade volume of the various conferences and deprive them of the flexibility Congress intended them to have in tailoring their self-policing systems to their individual needs.[7]

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[7]Section 528.3(b)(3) authorizes the Commission to exempt a conference only from the requirement of establishing an outside

[footnote continued]

The document disclosure provision of the Commission's regulations does particular violence to the self-policing scheme envisioned by Congress. In addition to requiring that all records—wherever located—be turned over to the outside agency, the rules prohibit a conference agreement from (1) denying access to such records, reports or other information in contravention of a Commission order or (2) precluding conference members from disclosing the nature and extent of their involvement with the self-policing authority. 46 C.F.R. §§528.2(c)(1)(iii), 528.1(c).

Congress and the courts have previously recognized that multinational shipping conferences regulating ocean-going freight rates and service depend for their continued existence upon a system of confidential self-policing of conference obligations. Because of the intense competition for business, a steamship company is usually reluctant to let it become known that it has complained about an illegal arrangement entered into by a competitor with a shipper, for fear of losing the latter's business. As the court noted in *States Marine Lines, Inc. v. Federal Maritime Commission*, 376 F.2d 230, 238 (D.C. Cir. 1967):

> The Commission and the Conferences maintain that secrecy is critical to the success of the policing system. . . . [W]e accept the Commission's finding that the system cannot operate otherwise.[8]

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policing agency. However, the exemption provision states that petitions for exemption will not be "lightly granted," and the right to an exemption is so circumscribed with vague and subjective conditions that it is virtually impossible to determine whether any conference could secure an exemption. To date, no exemption has been granted. The Commission has, moreover, adopted a statement of policy requiring all conferences which have filed for an exemption to comply with the neutral body requirement "unless and until" the exemption is granted.

[8]The court also emphasized in *States Marine* that Section 15 does not authorize the Commission to become involved

[footnote continued]

The majority opinion below recognized that compelling self-policing entities to disclose their records to the Commission "clearly would run contrary to the legislative history of the 1961 amendments [to the Shipping Act]." (Pet. App. A, *infra*, p. 38a.) Curiously, however, the majority held that, because the rule does not by its terms *affirmatively* require disclosure of documents and records but only prohibits a self-policing entity from "deny[ing] access . . . in contravention of a duly issued order of the Federal Maritime Commission," there was no flouting of Congress's rejection of compelled disclosure.

Obviously, the substance of the Commission's rule is the same, whether phrased in the affirmative or double negative. Prohibiting denial of access is the equivalent of compelling grant of access. As Judge Markey stated, negative phrasing does not change the essential "confidentiality-destroying effect" of the rule. (Pet. App. A, *infra*, p. 53a.)

The majority's dismissal of petitioners' challenge to this rule as "premature" also ignores the Commission's expressed purpose to use documents compiled by self-policing bodies for collateral enforcement of the Shipping

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> [I]n the task of examining all the evidence presented to the Neutral Body. . . . This, of course, is not the responsibility assigned the Commission by Section 15. Section 15 authorizes the Commission to "disapprove, cancel or modify any agreement," not to sit in judgment of the day-to-day operations carried out under that agreement. Moreover, to place the Commission in the role of an on-going appellate panel, intimately involving it in a case-by-case review of the Conferences' Neutral Body system, would hardly be consistent with Congress' intent that the Conferences engage in *self*-regulation.

376 F.2d at 242 (emphasis in original).

Act. The Commission stated that it intends to assess an additional penalty on a wrongdoer already subjected to an enforcement action by a conference. This use of conferences' policing records to support imposition of additional, independent penalties by the Commission is totally at odds with the division of enforcement responsibility between conferences and the Commission provided by Section 15. As Judge Markey noted in dissent, the Commission's use of a conference's self-policing actions as a basis for further penalties "creates a classic 'catch-22,' in which a conference is doomed by its successes." (Pet. App. A, *infra*, p. 55a.)[9]

Foreign steamship companies and their governments have objected to excessive regulation by the United States of the international shipping industry. As detailed below, foreign maritime nations have stated in the strongest terms that they would rather see the conferences dissolve than permit their nationals to comply with requests for production from the Commission. The intended use of internal documents to impose additional penalties on conference members will surely hasten this process of withdrawal. With non-conference competitors subject to no policing requirements, the prospect of dual policing and dual penalties places too high a price on conference membership.

The majority mistakenly characterizes petitioners' claim as a denial of the Commission's power to proceed

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[9]In his dissent from the final rules, Commissioner Bakke noted that he was "appalled" by the system of dual penalties outlined by the Commission. (JA below at 785.) He questioned whether the continued cooperation of foreign carriers could be expected in the event the conferences' self-policing body became a "conduit" through which information was supplied to the Commission for collateral enforcement purposes. (*Id.* at 787.)

by rulemaking. (Pet. App. A, *infra*, p. 15a.) Petitioners do not contend that under Section 43 of the Shipping Act, 46 U.S.C. §841a, the Commission is not authorized to promulgate regulations necessary to carry out the provisions of the Act.[10] However, it is axiomatic that a general grant of rulemaking authority to an agency cannot be exercised to achieve a result contrary to the clearly expressed intent of Congress. *Blair v. Freeman*, 370 F.2d 229, 235 (D.C. Cir. 1966); Davis, *Administrative Law Text* §6.04, at 145 (3d ed. 1972).

b. Legislative History of Section 15

In enacting the 1961 amendments to the Shipping Act, Congress considered and rejected granting the Commission the specific policing powers that it now seeks to exercise. Testimony and comments submitted to Congress at the time convinced it that Commission authority to prescribe, in advance, general policing standards for all conference agreements and to have access to documents and records of self-policing agencies presented too great a threat to the continued operation of the conferences.

i. Authority to Set Policing Standards

Two separate proposals which would have authorized the Federal Maritime Board, the Commission's predecessor, to determine the self-policing requirements of a conference agreement, prior to implementation, were

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[10]The regulations governing self-policing agreements which were promulgated in 1967 and upheld in *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967) (*per curiam*), require only that each conference agreement contain a description of its self-policing mechanism and that each conference submit semi-annual reports describing self-policing activities. The court characterized the nexus between even these limited regulations and Section 15 as "attenuated." *Id.* at 984.

considered and rejected by Congress. The version of Section 15 contained in the House bill provided that:

> No conference agreement shall be approved unless the Board finds that it contains *effective* provisions for policing the obligations under it. The Board shall disapprove any such agreement, after reasonable notice, on a finding of inadequate policing of the obligations under it.[11]

This provision, which would have authorized the Commission to do what it has done here, *i.e.*, to scrutinize in advance the effectiveness of conference agreement self-policing provisions, was rejected by the Senate Merchant Marine and Fisheries Subcommittee. In hearings held before that Subcommittee, a spokesman for the American carrier industry objected strongly to the House-passed provisions:

> Mr. Wierda: We would like to suggest that that sentence be completely deleted from the bill and the remainder stay in there, which says that the Board then shall disapprove any agreement if it finds, after some experience and after reasonable notice, that it does not actually police the obligations under it. We think that is more reasonable and more practical.
>
> Senator Engle (presiding): I agree with you.
>
> * * * * *
>
> I think it would be a mistake to try to tell the Federal agency that they are going to regulate this, because they are not going to regulate it . . .[12]

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[11] H.R. 4299 (Draft Revision No. 2), 87th Cong., 1st Sess., published on April 13, 1961 (emphasis added).

[12] Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce, 87th

[footnote continued]

Immediately following the hearings, a Subcommittee Print of the bill was released which deleted the House provision authorizing the Board to scrutinize agreements for "effective provisions." In its place, the Senate bill authorized the Board to "prescribe general standards of organization and procedure with respect to conference policing and enforcing devices and agencies. . . ."[13] Thus, this substitute measure, too, would have given the Board the power to prescribe general policing standards.

However, the Senate Subcommittee received extensive testimony from foreign government and industry witnesses criticizing the provisions as an impediment to the process of self-regulation. The British government expressed the common concern, stating that the proposals relating to policing and enforcing were:

> inconsistent with the principle, which H.M. Government support, that conferences should themselves be responsible for policing and enforcing their agreements and that it is inappropriate for the agency of a single Government unilaterally to prescribe standards of organization and procedure for the control of international shipping services in which other countries have an equal concern.[14]

Cong., 1st Sess. (Parts 1 and 2), p. 533. As Judge Markey pointed out in dissent, there is not the slightest evidence in this colloquy or elsewhere in the legislative history to support the majority's view that Congress's objection to Commission intrusion in conference self-policing was only temporary and would be removed once the Commission gained experience with the conference system. (Pet. App. A, *infra*, p. 57a n.9.)

[13] *Id.* at 698.

[14] *Id.* at 631. Numerous spokesmen emphasized the practical problems of prescribing uniform rules to meet the varying needs of different conferences. A spokesman for a Far Eastern conference

[footnote continued]

The final bill reported by the Senate deleted both of the controversial provisions. The Senate Report accompanying the bill stated:

> *We also deleted a provision which would have amended section 15 to require that no conference agreement could be approved unless the Commission found that the agreement contained "effective" provisions for policing the obligations under it.* Your committee's amendment would require the Commission to disapprove any conference agreement if it found, after notice and hearing, that as among the members there had been inadequate policing and enforcing of their obligations under the agreement.

S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3124 (emphasis added). As the Court of Appeals pointedly noted in *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F.2d 981, 984 n.7 (D.C. Cir. 1967), Congress thus eliminated the provision

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warned that the House and Senate proposals presented "the same danger that the Board, in order to avoid speculation, will promulgate standards for policing arrangements which will be completely unsuited for some trades, and much too ponderous and expensive for others." *Id.* The North Atlantic conferences agreed that:

> there can be no general advance standards of organization applicable to all situations and all times. The real test is whether or not there are adequate policing and enforcing devices—that is, whether they work. We agree that the Board is entitled to determine this and to act accordingly. We do not agree that it can set up any general standards which would be universally satisfactory.

Id. at 685-86. To similar effect was testimony submitted by Trans-Atlantic, Danish, Norwegian, and Dutch shipowners and conferences.

authorizing the Commission to require that "effective" provisions be included *before* an agreement could be approved. The Commission is therefore now claiming an authority that Congress deliberately withheld from it.

ii. Commission Access to Policing Documents and Records

As the majority of the Court of Appeals acknowledged, Congress explicitly decided against giving the Commission power to compel production of records and documents of self-policing activities in Section 15 of the Act. (Pet. App. A, *infra*, pp. 35a-36a.) A proposal to include such a provision in the 1961 amendments raised such a "storm of protests"[15] that Congress quickly decided that implementation of such a plan could shatter the conference system.

Section 15 of the House Bill provided that no agreement was to be approved by the Commission unless it (1) designated a person upon whom service of process could be made in the United States, which would be effective against every signatory to the agreement, and (2) provided that every signatory would make available records or other information required by order of the Commission. This proposal and a similar proposed amendment to Section 21 of the Act, 46 U.S.C. §820, met with virtually uniform opposition during hearings before a Subcommittee of the Senate Commerce Committee.

The State Department urged the Committee to delete the provisions "because of their irreparably damaging effect upon important considerations of foreign policy."[16] A dozen friendly maritime nations filed

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[15]S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3131.

[16]*Id.* During the hearings, the Honorable George W. Ball, then Under-Secretary of State for Economic Affairs, warned that, while

[footnote continued]

protests.[17] Every American and foreign-flag conference line urged their deletion.[18] Only the Federal Maritime Board favored the provisions. As the Senate Committee Report commented:

> Apparently the regulatory agency feels that so long as it is required to enforce the Shipping Act here and abroad with no distinction between those transactions which are in our import commerce and those which are in our export commerce, it must be given service-of-process powers and document-production powers similar to that contained in the House bill. Your committee believes, however, that "saying" the Commission has such powers, which obviously it cannot enforce effectively against the nationals of unwilling foreign governments, would result only in such provisions being enforceable effectively against American-flag lines, thereby prejudicing them in relation to their relatively unreachable foreign-flag competitors.[19]

To avoid this threatened prejudice and to avoid dissolution of the conferences themselves, Congress

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foreign governments would ordinarily support a system of *self*-regulation:

> If U.S. control of the [policing] agency caused it to become an extension of the U.S. Government activity, the agency might be regarded as an organ of the U.S. Government.

Under these circumstances, he reported, several governments would be prepared to prevent their nationals from cooperating with the agency. Hearings on H.R. 6775 before the Senate Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce (Parts 1 and 2), 87th Cong., 1st Sess., at 586.

[17] S. Rep. No. 860, 87th Cong. 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3131.

[18] *Id.*

[19] *Id.*

struck these provisions from the final bill. The Senate Committee Report explains:

> Your committee deleted from the bill a provision which would have amended section 15, Shipping Act, 1916, to require that all agreements approved under that section . . . provide that every such signatory [to the agreement] shall furnish the Commission "records or other information," wherever located in compliance with Commission orders. This provision was so vigorously opposed, and for good reasons, by practically all interested parties except the Federal Maritime Board that we deleted it.[20]

The assertion of national jurisdiction has long been held suspect where it involves the delicate area of foreign relations and widely differing views of foreign governments as to the proper scope of unilateral regulation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398

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[20] *Id.* at 3124. The Senate Committee also rejected a compromise version contained in a Subcommittee Print, dated August 8, 1961, that would have empowered the Commission, in its discretion, to obtain self-policing records and documents. H.R. 6775 (Subcommittee Print), 87th Cong., 1st Sess.

The majority opinion below found a contradiction between petitioners' argument that the Commission is barred under Section 15 from compelling disclosure of records and the "fact" that two decisions had interpreted Section 21 of the Shipping Act to allow the Commission to compel ocean carriers subject to the Act to produce documents located outside the United States. *See Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961); *Kerr Steamship Co. v. United States*, 284 F.2d 61 (2d Cir. 1960), *vacated per curiam on other grounds*, 369 U.S. 422 (1962). However, as the Senate Report to the 1961 amendments recognized, the two opinions addressed only the question whether the Board orders had been lawfully issued, not whether they could be enforced. S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3132. The Report concluded that there were strong reasons why the power to compel production of conference records should be deleted from the bill.

[footnote continued]

(1964). In an Aide-Memoire of June 17, 1979,[21] eight foreign governments protested the regulations. In November 1979, the governments of the United States and the Consultative Shipping Group ("CSG")[22] held meetings in Washington, D.C. at which deep concern was again expressed, whereupon the CSG governments were prompted to formulate their position on the record. By date of November 2, 1979, there was incorporated in Item 7(b) of the Agreed Record this notation:

> In relation to General Order 7 (FMC self-policing rules) the CSG side stressed the importance of genuine conference self-regulation. In the CSG's view, too close a U.S. involvement in these rules would not only create jurisdictional problems, but would also discourage carrier cooperation with self-policing machinery, thus frustrating the U.S. and CSG's shared goal of eliminating conference malpractices.[23]

Reciting instances of malpractice, the majority below mistakenly assumed that the Commission could regulate

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> Certainly, we would only muddy the waters and do violence to our foreign policy were we to leave such provisions in the bill. Furthermore, we are convinced that if we did so a number of steamship conferences would have to dissolve since a number of foreign lines would be compelled by their governments to withdraw, rather than submit to the receipt-of-process and document-production pledge required by the language of the bill.

Id.

[21]Petitioners' Appendix J, *infra*, pp. 153a-154a.

[22]The following governments are members of the Consultative Shipping Group: Belgium, Denmark, the Federal Republic of Germany, Finland, France, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

[23]Agreed Record of Consultative Shipping Group, November 2, 1979.

such abuses only by imposing these new requirements on the conferences. But carrier abuses are subject to other corrective action by the Commission which, unlike the rules here, take into consideration the operation of the conference system and the foreign policy interests of the United States.[24] Moreover, since the Commission was created in 1961, it has not once instituted a proceeding to disapprove an agreement based on a conference's failure to police adequately the obligations under it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[23]For example, Congress only recently prohibited the imposition of sanctions against carriers absent diplomatic consultations by the Secretary of State and Presidential review. Shipping Act Amendments of 1979, 46 U.S.C. §821(c)(3) & (4).

Office-Supreme Court, U.S.
FILED
FEB 9 1981
ALEXANDER L. STEVAS,
CLERK

80-1346

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN/KOREA, *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2172

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE, ET. AL., AUSTRALIA/EASTERN U.S.A. SHIPPING CONFERENCE, ET AL., GULF-MEDITERRANEAN PORTS CONFERENCE, GULF EUROPEAN FREIGHT ASSOC., CONTINENTAL-US GULF FREIGHT, UNITED KINGDOM/USA, INTERVENORS

No. 79-1062

SEA-LAND SERVICE, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

GULF EUROPEAN FREIGHT ASSOCIATION, ET AL., UNITED KINGDOM/USA, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petition for Review of an Order of the
Federal Maritime Commission

Argued 14 December 1979

Decided 11 September 1980

Judgment entered this date

Charles F. Warren, with whom *George A. Quadrino* was on the brief, for petitioners in No. 78-2172.

Francis W. Fraser, with whom *Edward M. Shea* was on the brief, for petitioner in No. 79-1062.

Carol J. Neustadt, Attorney, Federal Maritime Commission, with whom *Edward G. Gruis*, Deputy General Counsel, Federal Maritime Commission, *John J. Powers, III* and *Robert J. Wiggers*, Department of Justice, were on the brief for respondents.

Also *Eliot J. Halperin* and *F. Conger Fawcett* entered appearances for intervenor, Latin America/Pacific Coast Steamship Conference, et al., in No. 78-2172.

Also *Stanley O. Sher* and *Marc J. Fink* entered appearances for intervenor, Australia/Eastern U.S.A. Shipping Conference, et al., in No. 78-2172.

Also *Edward S. Bagley* entered an appearance for intervenor, Gulf-Mediterranean Ports Conference, in No. 78-2172.

Also *Patricia E. Byrne* and *Howard A. Levy* entered appearances for intervenor, Gulf European Freight and United Kingdom/USA, et al., in No. 78-2172 and No. 79-1062.

Before: ROBINSON and WILKEY, *Circuit Judges* and MARKEY,* *Chief Judge*, United States Court of Customs and Patent Appeals

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

Opinion for the Court filed by *Circuit Judge* WILKEY.

Dissenting opinion filed by *Chief Judge* MARKEY.

WILKEY, *Circuit Judge:* This case is before the court on consolidated petitions to review an order issued by the Federal Maritime Commission (the Commission), amending Part 528 of its rules dealing with standards for self-policing systems,[1] pursuant to section 15 of the Shipping Act (the Act).[2] Petitioners are numerous ocean shipping conferences and rate agreements composed of both domestic and foreign carriers which ply the trade between various foreign and United States ports. Under section 15 of the Act, these conferences, subject to the Commission's approval, are permitted to fix transportation rates, as well as rules and regulations consistent with other substantive provisions of the Act, to which conference members must adhere. As a condition to the exemption from the antitrust laws contained in section 15, conferences are also required to ensure that members comply with the obligations contained in the conference agreements. If the Commission finds that conferences are inadequately policing compliance by the signatories, it is empowered to disapprove the conference agreement.

The rules promulgated by the Commission are intended to establish certain standards by which the Commission hereafter will judge the adequacy of the self-policing systems. These rules require the conferences to engage a self-policing body independent of the conference or rate fixing entity; grant the self-policing authorities certain investigatory powers that must be utilized; prescribe certain procedures for adjudication of breaches of the conference agreement, including the right to a hearing before an impartial arbitrator for accused members; and establish certain recordkeeping and reporting requirements. In addition, section 528.1(c) of the Commission's rules

[1] *See* 46 C.F.R. § 528 (1978).

[2] 46 U.S.C. § 814 (1976).

prohibits the conferences from inserting a provision in the conference agreements that would deny the Commission access to self-policing records or documents. Section 528.1(c) is also intended to aid the Commission in implementing its enforcement responsibilities under the Act.[3]

Petitioners attack these rules as beyond the rulemaking authority of the Commission.[4] In addition, petitioners raise several procedural objections to the Commission's adoption of the rules, including the contention that the Commission failed to afford petitioners adequate notice and opportunity for comment on certain of these provisions. For the reasons to be discussed, we conclude that each of the objections is without merit and affirm the order of the Commission.

Full understanding of this case requires a brief historical review of the conference system and the adminis-

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[3] More specifically, the Commission referred in its final rules to sections 14, 16, 18(b) of the Shipping Act, 46 U.S.C. §§ 812, 815, 817(b) (1976). Sections 14 and 16 prohibit, *inter alia*, ocean carriers subject to the Act from paying rebates to shippers, granting any undue or unreasonable preferences, advantages, or disadvantages to any traffic, and discriminating through use of various unfair devices against any shipper. Any carrier who violates any provision of those sections shall be guilty of a misdemeanor punishable by fine of not more than $25,000 for violations of section 14, and of not more than $5,000 for violations of section 16. Section 18(b) of the Act, 46 U.S.C. § 817(b), requires ocean carriers to file with the Commission all tariffs showing the rates and charges of such carrier and prohibits the carrier from charging or collecting any rate deviating from those filed with the Commission. Whoever violates this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

[4] Petitioners in No. 79-1062 challenge only section 528.1(c) of the Commission's rules. For purposes of convenience, we shall refer to petitioners in No. 79-1062 as Sea-Land, and to petitioners in No. 78-2172 as Trans-Pacific.

trative scheme under the Shipping Act of 1916 before and after the enactment of the 1961 amendments.

I. Statutory and Factual Background

In response to severe rate wars caused by a chronic excess supply of world shipping tonnage, ocean carriers in the last quarter of the nineteenth century began to join together into "conferences" for the purpose of stabilizing the trade by fixing rates and eliminating competition along particular world trade routes.[5] After an extensive investigation into the cartelization of the ocean shipping industry,[6] Congress passed the Shipping Act in 1916.[7] Aware of both the practical difficulty of any single government attempting to regulate the freight rates in an international industry as well as the perceived advantage of a stable rate system, Congress granted in section 15 of the Act an exemption from the antitrust laws for concerted rate activity by the conferences.

Congress, however, also sought to eliminate the worst abuses associated with the conference system by proscribing certain particularly unfair methods designed to drive out competitors from the trades.[8] In addition, in section

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[5] *See generally* Antitrust Subcomm. of the House Comm. on the Judiciary, The Ocean Freight Industry, H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1962) [hereinafter cited as Celler Committee Report].

[6] *See* House Comm. on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

[7] Shipping Act, ch. 451, 39 Stat. 728 (1914) (current version at 46 U.S.C. §§ 801-842 (1976)).

[8] For example, section 14 of the Act prohibited ocean common carriers from retaliating against shippers who patronize other carriers by refusing space accommodation when space is available or using other discriminatory practices, from giv-

15 of the Act Congress required the conferences to file their agreements with the Shipping Board and obtain approval of those agreements from the Board.[9] Although Congress contemplated that the conferences themselves would control their members' adherence to the obligations under the agreements, the Shipping Board, charged with administering and enforcing other regulatory provisions of the Act,[10] was also given responsibility for overseeing adherence by the conference signatories to their agreements. Section 15 authorized the Board to "disapprove, cancel or modify" agreements found to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports," or between American exporters and their foreign competitors, or those found to be detrimental to United States commerce, or to violate any other provision of the Act.[11]

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ing rebates to shippers on freights previously paid conditioned upon the shippers' exclusive use of the conference carrier (so-called "deferred rebates"), and from using "fighting ships," vessels operated at a loss, but subsidized by the conference. Shipping Act, ch. 451, § 14, 39 Stat. 728, 733 (1914) (current version at 46 U.S.C. § 812 (1976)).

[9] The Shipping Board was the designation of the original agency entrusted with the enforcement of the Shipping Act. With several intervening changes (U.S. Shipping Board 1933; U.S. Maritime Commission 1936; Federal Maritime Board 1950), these functions were transferred to the Federal Maritime Commission in 1961. *See* 26 Fed. Reg. 7315 (1961).

[10] *See, e.g.*, note 8 *supra*. The Shipping Board was given the powers to order anyone subject to the Act to file reports and records under section 21, 46 U.S.C. § 820; under section 22, 46 U.S.C. § 821, to investigate violations of the Act either on complaint or on its own initiative; and under section 27, 46 U.S.C. § 826, to subpoena witnesses and documents for this purpose.

[11] Shipping Act, ch. 451, § 15, 39 Stat. 728, 733 (1914) (current version at 46 U.S.C. § 814 (1976)).

Thus the Shipping Act of 1916 established the basic pattern of federal regulation of the ocean freight industry for the next forty-five years. The Act immunized the conferences' anticompetitive agreements from the antitrust laws for the purpose of securing more stable and uniform rates and, particularly important from the United States' viewpoint as the twentieth century progressed, protecting the economically weaker American-flag lines from destructive competition.[12] It proscribed certain especially cutthroat practices and, in addition, relied on the conferences themselves to regulate their members under the watchful supervision of the Shipping Board.

In practice, however, supervision of the conferences' self-regulatory efforts by the successive administrative bodies charged with this responsibility[13] proved woefully

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[12] This latter advantage coincides with the national maritime policy, embodied in other statutes as well, of promoting an American merchant marine, which is recognized as vital to both the national defense and the commercial welfare of the United States. *See, e.g., Alaska Bulk Carriers, Inc.* v. *Kreps*, 595 F.2d 814, 817-19 (D.C. Cir. 1979), *rev'd on other grounds sub nom. Seatrain Shipbuilding Corp.* v. *Shell Oil Corp.*, 442 U.S. 572 (1980); *American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156, 1158-59 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). It has long been acknowledged that the operating and capital costs of American-flag carriers are considerably higher than the operating and construction costs of foreign vessels. *See, e.g., id.*; CELLER COMMITTEE REPORT, *supra* note 5, at 18-24. Although Congress for many years has authorized both a subsidy for ships constructed in United States shipyards and an operating-differential subsidy for manning of American-flag vessels with American crews. *see* 46 U.S.C. §§ 1151-1183a (1976), maintenance of freight rates at levels higher than otherwise would prevail in the absence of concerted rate action also assists in the effort to place American shipping operations on a parity with foreign competitors.

[13] *See* note 9 *supra*.

inadequate, as the investigations and hearings surrounding the 1961 amendments to the Shipping Act revealed.[14] The immediate impetus to amend the Act was the need to confirm the legality of so-called dual rate contracts, seriously called into question by a 1958 Supreme Court decision.[15] In the course of investigating the antitrust aspects of these dual rate contracts, however, the Antitrust Subcommittee of the House Judiciary (Celler Committee) uncovered over two hundred violations of the Shipping Act and conference agreements.[16] To a great extent, these involved various unfair means that carriers devised to undercut the agreed-upon rate schedules, ranging from cash rebates to shippers, absorption of shippers' storage and trucking costs, falsification of bills of lading to understate the applicable rate or weight of the shipment, to more sophisticated types of secret concessions designed to lure a shipper's business, including lavish

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[14] *See* CELLER COMMITTEE REPORT, *supra* note 5, at 223-302, 359-99; *Hearings on H.R. 6775 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 1st Sess. 12-13, 16-20 (1961) [hereinafter cited as *Senate Hearings on H.R. 6775*].

[15] Under a dual rate contract, the conference establishes freight rates at two levels, the lower of which is charged to merchants who agree to ship cargoes on vessels of conference carriers exclusively. In *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), the Court held that dual rate contracts adopted by the conferences as "predatory devices" were violative of section 14 of the Shipping Act of 1916. Congress amended section 14b of the Shipping Act in 1961 to authorize the use of these contracts. *See* Act of 3 Oct. 1961, Pub. L. No. 87-346, § 1, 75 Stat. 762 (codified at 46 U.S.C. § 813a (1976)).

[16] *See* CELLER COMMITTEE REPORT, *supra* note 5, at 249-84; *Senate Hearings on H.R. 6775*, *supra* note 14, at 12 (statement of Representative Celler).

gifts and entertainment.[17] These flagrant violations of the Shipping Act and conference agreements undermined whatever stability in the trade and protection for the American-flag vessels that the conferences were thought to afford.[18] Congress, while anxious to retain the conference system, thus recognized the urgent need to enact more effective regulation to curtail malpractices in the ocean shipping industry.[19]

Fully aware of the international complexities involved in attempting to tighten control over conference self-policing systems, Congress nevertheless was determined to curb abuses in the trades and thus amended section 15 of the Shipping Act to provide: "The Commission shall disapprove any [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it . . . ."[20] In section 15 Congress thus commanded the conferences to make their self-regulation effective or risk disapproval of the conference agreements and as a consequence lose their antitrust immunity. Congress also made clear that the mandatory self-policing clause was intended to "in nowise diminish the powers, duties, and responsibilities" of the Commission under the Act.[21] Indeed, Congress amended section 15 to enlarge the

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[17] *See* CELLER COMMITTEE REPORT, *supra* note 5, at 249-84, 107 CONG. REC. 19,332, 19346-74 (Senate debate on H.R. 6775).

[18] *See, e.g.*, CELLER COMMITTEE REPORT, *supra* note 5, at 251-54; S. REP. No. 860, 87th Cong., 1st Sess. 1-3 (1961); H.R. REP. No. 498, 87th Cong., 1st Sess. 1-7 (1961).

[19] As used in the trade, the term "malpractices" connotes any act, omission, or course of dealing which violates a provision of the Shipping Act, a conference agreement or regulation, or otherwise constitutes an unfair method of competition. *See* CELLER COMMITTEE REPORT, *supra* note 5, at 249.

[20] Act of 3 Oct. 1961, Pub. L. No. 87-346, § 2, 75 Stat. 762, 763 (codified at 46 U.S.C. § 814 (1976)).

[21] H.R. REP. No. 498, 87th Cong., 1st Sess. 10-11 (1961).

Commission's powers over agreements filed under that section [22] and entrusted to the Commission the obligation of ensuring that conferences fulfill their duty to adequately police their members. Of central importance to the Commission's ability to carry out its substantive responsibilities was Congress's decision to add a new provision, section 43, which vastly expanded the Commission's rulemaking powers under the Act.[23]

Shortly after the enactment of the 1961 amendments, the Commission used its rulemaking powers to implement its obligation under section 15 to disapprove any conference agreement, on a "finding of inadequate policing of the obligations under it," by promulgating General Order 7.[24] That order prescribed general reporting requirements and directed the conferences to include in their agreements filed with the Commission a general description of the methods used to police the obligations contained in those agreements. Although in section 15 of the Act Congress conditioned the continued legality of the conference agreements upon adequate self-policing, the Commission's investigations over the next ten years indicated that major incidences of rebating in the trades remained a pervasive and perennial problem.[25] Confronted with the conferences' utter failure to control these violations of conference agreements and the Shipping Act, the Commission determined that greater guidance should be given to the industry concerning the scope and type of self-

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[22] For example, Congress added the public interest standard to section 15, which empowered the Commission to disapprove any conference agreement on a finding that such agreement would be contrary to the public interest. *See id.* at 18.

[23] Act of 3 Oct. 1961, Pub. L. No. 87-346, § 7, 75 Stat. 762, 766 (codified at 46 U.S.C. § 841a (1976)).

[24] *See* 46 C.F.R. § 528 (1963) (superseded).

[25] *See* notes 51-53, 67 *infra* and accompanying text.

policing systems required to fullfill the conferences' obligation to regulate their members adequately. While Congress had reaffirmed its desire for a self-policing system, presumably an *effective* self-policing system was intended; hence the Commission perceived a duty to carry out this intent of Congress.

Accordingly, on 23 February 1973 the Commission issued a notice of proposed rulemaking (in Docket No. 73-5) to revise regulations governing section 15 agreements generally and to amend General Order 7 dealing particularly with self-policing systems.[26] The notice proposed to change the self-policing rules to require the conferences to engage a policing body independent of the conference or rate fixing body (neutral body), directed that entity to "constantly police" the activities of the conference members through surprise audits and inspections of books and records, and required copies of all records of self-policing activities to be maintained in the United States, available for the Commission's inspection. In addition, these records were required to show the identity of a party found to have violated a conference agreement following the final disposition of a disciplinary proceeding.

Concluding that the issues pertaining to the self-policing systems were of sufficient significance to warrant separate consideration, the Commission on 17 October 1973 issued a new notice of proposed rulemaking (in Docket No. 73-64) for the sole purpose of amending the self-policing regulations.[27] These proposed rules retained the neutral body requirement, unless the conferences qualified for an exemption set forth in the rule; retained the requirement that these self-policing entities provide the Commission upon request with a copy of all records of self-policing activities, permitting, however,

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[26] 38 Fed. Reg. 4982 (1973).

[27] *Id.* at 28,841.

the names of the parties involved to be deleted; and broadened considerably the original reporting provisions set forth in General Order 7 to require semi-annual reports showing the general nature and basis of each investigation, the findings with respect to each, and a specific description of the violations found and sanctions imposed.

After permitting interested parties an opportunity to comment on the proposed rules, the Commission promulgated on 18 April 1978 what were termed "Final Rules" (April rules).[28] These rules also contained the requirement of a neutral body policing authority, invested this body with more expansive investigatory and adjudicatory powers, required more detailed reports to the Commission of investigations and adjudications of breaches, and in response to considerable opposition in the industry eliminated the provision directing the self-policing authorities to permit the Commission access to self-policing records.

The Commission entertained nineteen petitions for reconsideration. After evaluating these petitions, the Commission on 14 September 1978 issued its "Reconsideration and Modification of Final Rules" (September rules).[29] These final rules amended the April rules to simplify the reporting requirements to an extent, required the policing bodies to maintain more extensive records of their investigatory activities, and added a provision which prohibited the conferences from denying the Commission access to self-policing records. The Commission denied petitioners' requests for reconsideration of the September rules and affirmed these rules by order on 18 December 1978. This appeal followed.

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[28] 43 *id.* at 18,175 (28 Apr. 1978).

[29] *Id.* at 42,757 (21 Sept. 1978).

II. ANALYSIS

Only petitioner Trans-Pacific challenges, on both substantive and procedural grounds, those provisions of the Commission's rules which require the conferences to engage a self-policing body independent of the conference or rate fixing entity;[30] grant that self-policing entity certain investigatory powers that must be followed, including the requirement that the policing body conduct inspections and audits of the conference members' records and other documents;[31] prescribe minimum procedural safeguards for adjudication of breaches, including the right to a hearing before an "impartial arbitrator";[32] and establish certain recordkeeping[33] and reporting requirements[34] with respect to self-policing investigations and adjudications. Both petitioners Trans-Pacific and Sea-Land object, on both substantive and procedural grounds, to the Commission's promulgation of section 528.1(c), which prohibits the conferences from inserting any clause in their conference agreements that would deny the Commission access to self-policing records or documents. With the regulatory and historical background in mind, we turn first to those regulations attacked solely by Trans-Pacific.

A. *Neutral Body Provision, Investigatory and Adjudicatory Procedures, and Recordkeeping and Reporting Requirements*

1. *Statutory Authority*

Trans-Pacific challenges these rules first on the grounds that both a plain reading of section 15 as well as the

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[30] 46 C.F.R. § 528.3(b) (1978).

[31] *Id.* § 528.2(c).

[32] *Id.* §§ 528.1(b), 528.2(d), 528.4.

[33] *Id.* §§ 528.2(c)(1)(v), 528.3(f).

[34] *Id.* § 528.5.

legislative history of that section indicate that the Commission is precluded from prescribing in advance, through its rulemaking powers, detailed standards by which it will thereafter appraise the adequacy of the conferences' self-policing systems. Petitioner insists that the Commission instead is limited to determining on an *ad hoc* basis, after notice and hearing, whether a conference adequately is policing its members. In *Outward Continental North Pacific Freight Conference* v. *Federal Maritime Commission*,[35] this court rejected the same objections raised to the Commission's adoption of General Order 7, the predecessor regulations to those at issue in this case, as inconsistent with both the regulatory scheme envisioned under the 1961 amendments as well as with settled principles of administrative law.[36] For much the same reasons, we now reject petitioner's challenges to the Commission's rules as totally devoid of merit.

Section 15 provides in relevant part: "The Commission shall disapprove any [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it."[37] Trans-Pacific first argues that a plain reading of section 15 indicates that the Commission is limited to withdrawing approval of an agreement after notice and hearing and a specific finding that the actual policing operations of a particular conference are

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[35] 385 F.2d 981 (D.C. Cir. 1967).

[36] The court in *Outward Continental* largely relied on this court's reasoning in *Pacific Coast European Conference* v. *FMC*, 376 F.2d 785 (D.C. Cir. 1967). That case rejected a challenge to the Commission's use of its rulemaking powers to define another clause of section 15, which provides that "[n]o [conference] agreement shall be approved . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade." 46 U.S.C. § 814 (1976).

[37] 46 U.S.C. § 814 (1976).

inadequate. In essence, petitioner's claim is a denial of the Commission's power to proceed by rulemaking, a contention that this court rejected in *Pacific Coast European Conference* v. *Federal Maritime Commission* as a "doctrinal archaism in modern administrative law." [38]

Where an administrative agency has been granted both rulemaking and adjudicatory powers, the statutory requirement of a hearing does not preclude necessarily an agency from particularizing those statutory standards through the rulemaking process and denying a hearing at the outset to those who are in violation of the rules.[39] This doctrine rests on a simple but fundamental principle of administrative law: to make the administrative process effective, an agency must have the discretion to proceed either by general rule or by *ad hoc* litigation.[40] Rulemaking is an essential component of the administrative process and indeed is often the preferred procedure for

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[38] 376 F.2d 785, 789 (D.C. Cir. 1967). *See* note 36 *supra.*

[39] *See, e.g., Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 39-41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202-06 (1956); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 628-30 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966).

[40] *E.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 770-72 (1969) (Black, J., concurring); *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 39-41 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202-06 (1956); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201-03 (1947). "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203. *See also Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25, 543 (1978).

the evolution of agency policies.[41] Rulemaking permits more precise definition of statutory standards than would otherwise arise through protracted, piecemeal litigation of particular issues. It allows all those who may be affected by a rule an opportunity to participate in the deliberative process, while adjudicatory proceedings normally afford no such protection to nonparties. And because rulemaking is prospective in operation and general in scope, rather than retroactive and condemnatory in effect, interested parties are given advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved.[42]

Under general principles of administrative law, then, an agency is not to be constricted by the formalities of the adjudicatory process in the absence of a clear congressional intent to the contrary.[43] Under the particular statutory scheme at issue, Congress added in the 1961 amendments to the Shipping Act section 43, which empowered the Commission to "make such rules and regulations as may be necessary to carry out the provisions of

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[41] *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); *Pacific Coast European Conference* v. *FMC*, 376 F.2d 785, 789 (D.C. Cir. 1967); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 629 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.25 (2d ed. 1979); Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929-41 (1965).

[42] *See, e.g., United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973); *FTC* v. *Brigadier Indus. Corp.*, 613 F.2d 1110, 1116-18 (D.C. Cir. 1979); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 631 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.25 (2d ed. 1979).

[43] *See, e.g., American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 629 (D.C. Cir.), (en banc), *cert. denied*, 385 U.S. 843 (1966).

this Act."[44] *Congress thus expressly made section 43 applicable to all sections of the Act.* We find nothing in the language of section 15 requiring "notice and hearing" that subtracts from the Commission's rulemaking powers either expressly or by implication.[45]

Nor does anything in the legislative history of the 1961 amendments to section 15 of the Act negate the extension of the Commission's rulemaking powers to that section. Trans-Pacific's argument that Congress withheld from the Commission the authority to promulgate standards applicable to all conferences and rate fixing entities which the Commission deems necessary for adequate self-policing is predicated on Congress's rejection of an amendment to section 15 that the House proposed in H.R. 6775. That amendment provided: "No conference agreement shall be approved unless the [Commission] finds that it contains effective provisions for policing the obligations under it."[46] In striking this provision and substituting the language that eventually was enacted into law, the Senate noted only that:

> We also deleted a provision which would have amended section 15 to require that no conference agreement could be approved unless the Commission found that the agreement contained "effective" provisions for policing the obligations under it. Your committee's amendment would require the Commission to disapprove any conference agreement if it found, after notice and hearing, that as among the

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[44] Act of 3 Oct. 1961, Pub. L. No. 87-346, § 7, 75 Stat. 762, 766 (codified at 46 U.S.C. § 841a (1976)).

[45] *See Outward Continental N. Pacific Freight Conference* v. *FMC*, 385 F.2d 981, 983-85 (D.C. Cir. 1967); *Pacific Coast European Conference* v. *FMC*, 376 F.2d 785, 788-90 (D.C. Cir. 1967).

[46] *See* H.R. REP. No. 498, 87th Cong., 1st Sess. 40 (1961).

members there had been inadequate policing and enforcing of their obligations under the agreement.[47]

This exchange of language must be viewed in its proper context. By merely deleting the House proposal, Congress could not have intended to impair the Commission's newly granted rulemaking authority under section 43: to reiterate, Congress extended that section's coverage to all provisions of the Act.[48] With that in mind, the Senate's action may be interpreted to mean no more than it did not consider it wise to *require* the Commission to assess the "effectiveness" of self-policing methods *at that time*, before the Commission had any opportunity to observe how the self-policing systems would function under the 1961 revisions—which tied the continued legality of the conference agreements to adequate self-policing.[49] Indeed, this court in *Outward Continental*

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[47] S. REP. No. 860, 87th Cong., 1st Sess. 17-18 (1961).

[48] *E.g., id.* at 20.

[49] The following exchange between Donald Wierda, a representative of the American Steamship Committee on Conference Studies, and Senator Engle, Chairman of the Senate Subcommittee on Merchant Marine and Fisheries, is illustrative:

> Mr. Wierda. While we are on that subject, Senator, we would like to refer to page 6, line 14 [of the draft bill], which provides that—
>
> No conference agreement shall be approved unless the Board finds that it contains effective provisions for policing the obligations under it.
>
> The American-flag lines have no objection whatsoever; as a matter of fact, we support having the obligation for policing the conference agreement to be included in the basic agreement of the conference. On the other hand, we feel that this prior requirement that the conference agreement include it before the Board can even approve a conference agreement is not reasonable. Today this neutral body system and other systems for policing are

North Pacific Freight Conference v. *Federal Maritime Commission*, on rejecting an argument that the Commission was precluded from requiring the conferences as a general rule to include certain provisions in their agreements, interpreted the Senate's action in exactly this manner. After reciting the Senate's deletion of the House language, the court stated that "other legislative history indicates that what Congress objected to was not any requirement of a provision in the agreement but rather the requirement of *effective* provisions which must be included *before* the agreements could be approved in 1961." [50]

Petitioner's final, substantive objection to the rules is a general rather than specific challenge to any particular provision: namely, that these rules taken together as a whole are contrary to congressional intent that the conferences engage in self-regulation. By prescribing the kind of self-policing body that must be employed, as well as dictating to that body the procedures that must be followed for investigating and adjudicating breaches

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very new. We are groping, trying to find the best way of doing it. We don't think that the Board today knows what an effective policing system is. We don't think that they will know in the next year, either, because we have had these things in effect for a year, two, or three, and we are learning everyday something is wrong with it and how they can be improved.

We would like to suggest that that sentence be completely deleted from the bill and the remainder stay in there, which says that the Board then shall disapprove any agreement if it finds, after some experience and after reasonable notice, that it does not actually police the obligations under it.

We think that is more reasonable and more practical.

Senator Engle. I agree with you.

Senate Hearings on H.R. 6775, supra note 14, at 539, 553.

[50] 385 F.2d 981, 984 n.7 (D.C. Cir. 1967) (emphasis in original; citations omitted).

of conference agreements, the type of records that must be maintained, and the type of reports that must be submitted to the Commission, petitioner claims that the Commission has removed all flexibility and discretion from the conferences in conducting their self-policing activities and impermissibly has substituted its own concept of policing for that of conference self-regulation. We disagree.

Petitioner's argument ignores the crucial fact that the Commission has the *statutory obligation* of ensuring that the conferences *in fact adequately police* their members. The Commission's investigations over the past decade have revealed that "existing self-policing systems [which] rely primarily upon member initiated complaints . . . have failed to confront or control major incidents of rebating in both the Atlantic and Pacific trades." [51] Faced with

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[51] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,757 (1978), *reprinted in* Joint Appendix (J.A.) at 729, 733. The Commission noted in its final rules that:

> Some 30 settlement agreements have been reached in FMC rebating investigations since January 1, 1977. The civil penalties incurred under these agreements exceed $5,000,000. An equal number of FMC enforcement claims seeking another $5,000,000 for alleged rebating violations is currently outstanding. Still other rebating cases are being processed by the Commission's staff.

Id. at 42,757 n.4, J.A. at 733 n.4.

Seven of the settlement agreements covering the period between 1 April 1973 and 31 March 1978 are reproduced in the appendix to the Commission's brief. *See* Brief for Federal Maritime Commission, Appendix (Exhibits 2 through 8) (violations of §§ 16, 18(b) of the Act, 46 U.S.C. §§ 815, 817b (1976)). These agreements also indicate that rebating and other malpractices in the ocean shipping industry are not confined to the Atlantic and Pacific trades. *See, e.g., id.* (Exhibit 2) (settlement between Sea-Land Service and the

this abysmal performance on the part of many of the conferences, the Commission concluded that the self-policing systems, in addition to relying on complaints brought by members, must initiate investigations on their own; that to make these investigations effective the self-policing bodies must also conduct surprise audits and inspections of books, records, billings, and other documents of conference signatories; and that the conferences in addition must engage a policing entity independent of the conferences to counteract any possibility of bias which a policing body affiliated with the conferences might encounter.

Concededly these rules are more detailed than prior regulations applicable to self-policing systems; yet the conferences, through the conduct of their own members, have proven themselves in need of greater guidance from the Commission. Congress recognized that the industry was in need of greater agency supervision in the hearings and legislation of 1961; implementing the overall intent of Congress regarding regulation of the conferences is what the Commission attempted to accomplish in the regulations challenged here. Moreover under these provisions, the self-policing bodies still have discretion in conducting their investigations. The Commission has stated in its final rules that "[i]t is unnecessary, however, for all investigations to be identical in scope." [52] With the widespread failure on the part of many of the conferences to secure their members' adherence to the obligations in the conference agreements and to the Shipping Act, we find that the Commission was authorized to adopt as a

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Commission involving violations of the Shipping Act in the United States trades with Europe, the Mediterranean, the Caribbean, and the Far East).

[52] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,758 (1978), *reprinted in* J.A. at 729, 737.

general rule more detailed and comprehensive provisions concerning the type and scope of the self-policing systems that the Commission deems necessary to ensure that malpractices in the industry are curtailed.[53]

Also critical to the Commission's ability to fulfill its obligation to oversee the conferences' self-regulatory efforts is the need to obtain reliable information concerning the nature and performance of the self-policing systems. The self-policing reports required to be submitted to the Commission under General Order 7 have reflected poorly the actual conditions in the trades. These "bare bones self-policing reports" to a great extent have indicated only minor violations of the conference agreements, while the Commission's own investigations have uncovered "major incidents of rebating" in the ocean shipping industry.[54] In light of the paucity and inaccuracy of the conference reports, the Commission was also authorized to promulgate rules requiring the conferences to keep

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[53] While not all of the ocean carriers in the United States trades may have been guilty of violating their conference agreements and the Shipping Act, that does not prevent the Commission from promulgating provisions designed to eliminate malpractices in the industry where the incidences of abuse have been sufficiently widespread to warrant general, remedial measures. *See* note 51 *supra*. Moreover those conferences whose members have not violated the Shipping Act or the conference agreements have some course of relief available: if a particular conference can make a convincing showing that the trade route served by its members has been relatively free of rebating or other conduct violative of the Shipping Act and is likely to remain so, it may obtain an exemption from the neutral body requirement. *See* 46 C.F.R. § 528.3(b)(3)(iii) (1978).

[54] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,757 & n.4 (1978), *reprinted in* J.A. at 729, 733 & n.4. *See, e.g.*, Brief for the Federal Maritime Commission at 53-54.

more detailed records of their policing activities and to submit more comprehensive reports to the Commission.

2. *Procedural Safeguards*

Having concluded that the rules promulgated by the Commission were within the Commission's delegated authority, we must determine whether these rules were accompanied by the appropriate procedural safeguards. Petitioner first contends that the Commission's notice of proposed rulemaking in Docket No. 73-64, issued on 17 October 1973, failed to provide interested parties a reasonable opportunity to offer comments and criticisms on the reporting and recordkeeping requirements set forth in sections 528.5 and 528.3(f), respectively, claiming that the published notice failed to inform interested parties of the eventual scope of these regulations.[55] We reject petitioner's argument as completely inconsistent with the nature of the notice required under section 4(b) of the Administrative Procedure Act (APA).[56]

Section 4(b) provides that rulemaking must be preceded by published notice of "(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[57] Notice need not contain every precise proposal which the agency ultimately may adopt as a rule. Rather notice is sufficient if the

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[55] Petitioner does not challenge the notice and opportunity to comment that the Commission afforded interested parties on the other rules dealt with in this part of the opinion. We are satified that with respect to those provisions the Commission has met its obligation under section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1976).

[56] Administrative Procedure Act § 4(b), 5 U.S.C. § 553(b) (1976).

[57] Administrative Procedure Act § 4(b)(3), 5 U.S.C. § 553(b)(3) (1976).

description of the "subjects and issues involved" affords interested parties a reasonable opportunity to participate in the rulemaking.[58]

Section 528.5 of the Commission's rules requires the self-policing bodies to submit semi-annual reports to the Commission disclosing that entity's self-policing and adjudicatory activities covering a six-month period including a thorough summary of the nature and scope of each investigation, a detailed description of the breaches detected, and a description of the final disposition of the case including any penalties assessed. That section also details what precise information must be included with respect to each category.[59] In the notice of proposed rulemaking issued on 17 October 1973, the Commission noticed its intent to amend the general reporting provisions set forth in General Order 7 to require the conferences to submit semi-annual reports showing the nature and basis of each investigation initiated during the preceding six-month period, the status or findings with respect to each investigation, and a specific description of the offense and the exact amount of the penalty imposed for each violation.[60] The rule as originally proposed thus differed in no material respect from the rule eventually adopted in section 528.5. Section 528.5 merely enumerates more specifically the type of information which the Commission seeks, but interested persons were on notice that a requirement of more detailed reports than those submitted to the Commission under General Order 7

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[58] *See, e.g., Forester* v. *Consumer Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 48 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *California Citizens Band Ass'n* v. *United States*, 375 F.2d 43, 48 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967).

[59] 46 C.F.R. § 528.5 (1978).

[60] 38 Fed. Reg. 28,841, 28,843 (1973) (section 528.4), *reprinted in* J.A. at 10, 20-21.

was under consideration. No error may be attributed to the fact that the notice of proposed rulemaking dealt with the reporting requirements in a more general way than section 528.5. Interested parties clearly were informed of the "subjects and issues involved" and were permitted ample opportunity to comment on those issues.

With respect to the recordkeeping requirements, section 528.3(f) of the Commission's rules requires the policing authority to compile and retain for at least five years a sufficient record of complaints received, investigatory action taken with respect to each complaint, copies of evidence received, and the reasons for the final disposition of each investigation.[61] In the notice of proposed rulemaking issued in Docket No. 73-64, no provision exactly comparable to section 528.3(f) was included. The reporting provisions noticed in the proposed rules, however, required that the same information, which rule 528.3(f) directs the policing authorities to maintain, be submitted to the Commission in semi-annual reports.[62] Inherent in those reporting proposals, obviously, was the requirement that some type of records of the self-policing authority's adjudicatory and investigatory activities be maintained. While the proposal that such information be maintained for the specific period of five years first was included in rule 528.3(f), that requirement did not materially alter the nature of the "subjects and issues involved." We find that interested parties sufficiently were apprised of those issues to permit them reasonable opportunity to participate in the deliberative process.

After all, if we were to say that regulatory agencies could only promulgate the exact rules noticed originally,

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[61] 46 C.F.R. § 528.3(f) (1978).

[62] *See* 38 Fed. Reg. 28,841, 28,843 (1973) (section 528.4), *reprinted in* J.A. at 10, 20-21; note 60 *supra* and accompanying text.

we would compel the agencies to choose between (1) ignoring all comments and all that the agency might learn from interested parties to improve the proposed rules, or (2) engaging in an interminable step-by-step process of a new notice and comment on rules only slightly changed from the original proposals. The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different—and improved—from the rules originally proposed by the agency.

Having determined that the Commission afforded interested parties sufficient opportunity to comment on these rules, we next must consider whether the Commission complied with section 4(c) of the APA, which requires an agency to incorporate in rules that it adopts "a concise general statement of their basis and purpose." [63] Trans-Pacific challenges the adequacy of the Commission's reasons for adopting section 528.3(b), the neutral body requirement.[64] We find this contention to be without substance and hold that the Commission fully satisfied the requirement set forth in section 4(c) of the APA.

The point of the "basis and purpose" statement required under section 4(c) is to enable the courts to determine whether the agency's rules were framed in an arbitrary or capricious manner. While the statement must be sufficiently detailed to allow a searching judicial scrutiny of the reasons for adopting the rules, courts consistently have taken a commonsense approach in interpreting this requirement. Thus "[w]here [the] regulations turn crucially on factual issues, we will demand sufficient attention to these in the statement to allow the fundamental

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[63] Administrative Procedure Act § 4(c), 5 U.S.C. § 553(c) (1976).

[64] Trans-Pacific makes no claim that the Commission failed to provide a concise statement of its reasons for adopting the other rules discussed in this part of the opinion.

rationality of the regulations to be ascertained." [65] By contrast, however, where the judgment necessarily is more speculative, turning on "choices of policy, on an assessment of risks, or on predictions . . . , we will demand adequate reasons and explanations, but not 'findings' of the sort familiar from the world of adjudication." [66]

The overriding justification advanced for the Commission's decision to adopt the rules in question was "over ten years of experience in reviewing bare bones self-policing reports," which clearly indicated to the Commission on the basis of its own investigations "that existing self-policing systems . . . have failed to confront or control major incidents of rebating" in the ocean shipping industry.[67] Concerning the requirement of an independent

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[65] *Amoco Oil Co.* v. *EPA*, 501 F.2d 722, 740-41 (D.C. Cir. 1974), *quoted in Ethyl Corp.* v. *EPA*, 541 F.2d 1, 23 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

[66] *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 23 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (quoting *Amoco Oil Co.* v. *EPA*, 501 F.2d 722, 741 (D.C. Cir. 1974)). *See City of Chicago* v. *FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *Automotive Parts & Accessories Ass'n* v. *Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

[67] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,757, *reprinted in* J.A. at 729, 733. Although Trans-Pacific makes the claim that the Commission should have detailed the "major incidents of rebating" in its notices of proposed rulemaking and orders, petitioner does not appear to challenge the Commission's findings, *see id.* at 42,757 n.4, J.A. at 733 n.4, nor can it seriously seek to do so. *See* Brief for the Federal Maritime Commission, Appendix (Exhibits 2 through 8) (listing settlement agreements between the Commission and various ocean carriers for rebating and other violations of the Shipping Act); note 51 *supra* and accompanying text. Moreover, the Commission avers that it

> has now entered into settlement agreements (9), or has outstanding administrative claims for civil penalties (5), against 14 of the 18 carriers who were listed on Septem-

self-policing entity in particular, the Commission stated that conference officials were overworked and understaffed and that this combination contributed to the utter failure of the conferences to fulfill their policing obligations.[68] The Commission concluded that an independent policing body, employed by the conferences, would not experience these difficulties of divided responsibilities and, in addition, would encounter little chance of bias in implementing its policing functions.[69] While the Commission presented no specific evidence that conference officials were overworked or understaffed and thus unable to devote sufficient effort to their policing obligations, we do not believe, as Trans-Pacific argues, that such evidence was necessary. The fact remains that many of the conference officials, for whatever reason, have failed to implement their policing responsibilities, and the Commission was permitted to act on that fact. Determination of what actual modifications in the self-policing systems were necessary to remedy this pervasive problem, involving questions of policy and predictions as to probable effect, did not require strict factual findings by the Commission. We conclude that the Commission has supplied adequate reasons and expla-

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ber 1, 1977 as members of the Trans-Pacific conference. Although these settlement agreements were entered into after the notices of proposed rulemaking in Dockets 73-5 and 76-4 were issued, they recite the occurrence of numerous rebating incidents in violation of the Shipping Act during the period from 1972 through 1978.

Brief for the Federal Maritime Commission at 53-54.

[68] *See* Notice of Proposed Rulemaking (Docket No. 73-64), 83 Fed. Reg. 28,841, 28,842 (1973), *reprinted in* J.A. at 10, 14; Final Rules (April rules), 43 Fed. Reg. 18,175, 18,176 (1978), *reprinted in* J.A. at 229, 234-36; Reconsideration and Modification of Final Rules, 42 Fed. Reg. 42,757, 42,757-58 (1978), *reprinted in* J.A. at 729, 733.

[69] *See, e.g.*, Final Rules (April rules), 43 Fed. Reg. 18,175, 18,176 (1978), *reprinted* in J.A. at 229, 235.

nations for its action to permit this court to review the underlying rationality of the rules.

3. *Standard of Review*

Under the arbitrary and capricious standard,[70] our scope of review is a narrow one.[71] After satisfying ourselves that the agency has acted within its statutory authority and that this action was accompanied by the appropriate procedural protections and was supported by sufficient evidence, we must inquire whether the rationale of the agency is both discernible and defensible.[72] In undertaking this inquiry, we may not substitute our judgment for that of the Commission, but may only assure ourselves that the agency decision was rational and based on a consideration of the relevant factors.[73]

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[70] *See* Administrative Procedure Act § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1976).

[71] *See, e.g., Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974).

[72] In *National Ass'n of Recycling Indus., Inc.* v. *ICC* (*NARI II*), No. 79-1393, slip op. at 13 (D.C. Cir. 25 Apr. 80), we phrased the usual inquiries concerning the action of an agency as follows:

> First, did the Agency act within its statutory authority? Second, was there procedural due process, *i.e.*, notice, followed by appropriate opportunity either to comment or to participate in a hearing? Third, is there evidence (substantial evidence in the case of adjudication) to support the Agency's action? Fourth, is the rationale of the Agency both discernible and defensible? If the answer to any of these is in the negative, then the Agency action must be vacated as either beyond its authority or arbitrary and capricious under Title 5, sections 553 and 706.

Id. (footnote omitted).

[73] *See, e.g., Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 33-36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976);

The record here indicates that over the last decade the existing self-policing systems have failed to detect, report, or control significant and widespread violations of the Shipping Act and the conference agreements in direct contravention of the conferences' obligation under section 15 of the Act. Under these circumstances, we discern a rational connection between the objective of ensuring that the conferences hereafter police their members adequately and the means employed—more detailed record-keeping and reporting responsibilities to keep the Commission abreast of actual conditions in the trades, the grant of broader investigatory powers to the self-policing authorities to enhance their ability to detect breaches by the conference members, and the requirement of a neutral body policing authority with neither the problem of divided responsibilities nor of divided loyalties.[74] To make clear that the latter requirement is tailored to the purpose of curtailing malpractices, the Commission has provided an exemption from the neutral body provision on a convincing showing by a conference that the trade route served by its members has been relatively free of rebating or other conduct violative of the Shipping Act, over the past five years, and that it is likely to remain so.[75] We therefore hold that the Commission was justified

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Mobil Oil Corp. v. *FPC*, 469 F.2d 130, 140 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); *City of Chicago* v. *FPC*, 458 F.2d 731, 744-45 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

[74] If a particular conference can make a convincing showing that "[t]he persons conducting self-policing activities are qualified and their self-policing activities would not substantially conflict with their other duties and responsibilities," it may obtain an exemption from the neutral body requirement. 46 C.F.R. § 528.3(b)(3)(i) (1978).

[75] *Id.* § 528.3(b)(3)(iii). In addition, contrary to Trans-Pacific's contention, the Commission considered the objection raised to the neutral body requirement that such a provision

in its conclusion that "independent self-policing bodies with broad investigatory powers and more detailed reporting responsibilities are necessary features of adequate self-policing—as a general rule." [76]

Concerning the requirement of an "impartial adjudicator," this court has held that the self-policing systems used by the conferences must afford accused members "fair treatment." [77] As a result of the broad investigatory and adjudicatory powers that the self-policing systems wield over the conference signatories, "fair treatment" demands some form of continuing, internal review.[78] The Commission therefore was permitted to find that as a minimum the self-policing bodies must guarantee accused members the right to appeal before an "impartial adjudicator," who "shall be vested with final authority to adjudicate disputes and assess damages within the scope of the self-policing system." [79]

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would impose a severe economic burden on smaller conferences. The Commission adopted an exemption to the rule for conferences which can demonstrate that the requirement would impose an undue economic burden on the conference members. Section 528.3(b)(3)(ii) provides that petitions for exemption must include a convincing showing that:

> (ii) The agreement is so limited in scope that the retention of an independent self-policing authority would impose an unrealistic financial burden on the members. The number of members, the financial condition of the members, the nature and extent of the trade, the competitive circumstances prevailing in the trade, and other activities of the members both within and without the trade (*e.g.*, participation in other agreements) are all relevant considerations[.]

Id. § 528.3(b)(3)(ii).

[76] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,758 (1978), *reprinted in* J.A. at 729, 733.

[77] *See States Marine Lines, Inc.* v. *FMC*, 376 F.2d 230, 234-42 (D.C. Cir. 1967).

[78] *See also id.* at 242.

[79] 46 C.F.R. § 528.4(b) (1978).

B. *Denial of Access to Documents Provision*

Also included within the Commission's rules is section 528.1(c), which prohibits the conferences from inserting any provision in the conference agreements that would deny the Commission access to copies of self-policing records, statistics, reports, or other documents.[80] Section 528.1(c) is designed both to facilitate the Commission's statutory obligation to ensure that conferences are policing their members adequately as well as to aid the Commission in its "wider responsibility to fairly and effectively enforce the Shipping Act." [81]

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[80] Section 528.1(c) provides in its entirety:

> (c) No self-policing system shall contain provisions which purport to:
>
> (1) Deny access to or copies of any self-policing records, statistics, reports, or other information (including the identity of members) in contravention of a duly issued order of the Federal Maritime Commission (or a Commission employee with delegated authority to issue such orders); or
>
> (2) Preclude any of its members from disclosing the nature and extent of their own involvement with the self-policing authority (e.g., any damages paid by the member) in any administrative or judicial proceeding to enforce the Shipping Act.

Id. § 528.1(c)

[81] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,759 (1978) (citation omitted), *reprinted in* J.A. at 729, 742.

In its final rules, the Commission referred specifically to sections 14, 16, 18(b) of the Shipping Act, 46 U.S.C. §§ 812, 815, 817(b) (1976). Sections 14, 16 prohibit, *inter alia*, ocean common carriers from paying rebates to shippers, granting any undue or unreasonable preferences, advantages, to any traffic, and discriminating through use of various unfair practices against any shipper. Any carrier who violates these sections shall be guilty of a misdemeanor punishable by fine. Section 18(b) prohibits, *inter alia*, ocean carriers

Both petitioners Sea-Land and Trans-Pacific challenge section 528.1(c) on the substantive grounds that the legislative history of the 1961 amendments indicates that Congress deliberately withheld from the Commission the authority to obtain access to self-policing records located abroad as a precondition to section 15 approval of the rate fixing agreements. In addition petitioners argue that the Commission's intention to use self-policing data in aid of its enforcement responsibilities improperly will interject the Commission into the day-to-day operations of the conference policing systems, contrary to congressional intent that conferences engage in self-regulation. Petitioners also claim that the Commission's use of section 528.1(c) as a means of implementing its enforcement obligations may well cause a breakup of the conference system. Petitioners predict that carriers, to avoid the threat of sanctions from both the self-policing entity and the Commission, may withdraw from the conferences rather than submit confidential documents to the policing authorities if those documents then may be obtained by the Commission.

We are aware, of course, that Congress declined to grant the Commission the power to obtain access to self-policing records wherever located as a precondition to section 15 endorsement of the rate fixing agreements, but we perceive no inconsistency between the legislative history of the 1961 amendments and section 528.1(c). Given

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from charging or collecting any rate or charge deviating from those tariffs required to be filed with the Commission. Whoever violates this section shall be subject to civil penalties,

One Commissioner dissented from the announced intention of the Commission to use section 528.1(c) in aid of its enforcement responsibilities, but agreed that the Commission should have access to self-policing data as part of its surveillance responsibility over the adequacy of the conferences' self-policing efforts. *See* Dissenting Op. (24 Oct. 1978), *reprinted in* J.A. at 780, 788-89.

the context of this case, we also think that petitioners' other concerns as to the potential implications and effects of the rule are raised prematurely. For reasons to be discussed, we hold that the Commission's promulgation of section 528.1(c) was a proper exercise of its authority under the Act.

1. *Substantive Challenges to Section 528.1(c)*

In its bill to amend the Shipping Act, the House included the following addition to section 15:

> No [conference] agreement shall be approved unless it shall (1) designate a person upon whom service of process may be made within the United States which will be effective against every signatory to such agreement, and (2) contains provisions that every signatory shall provide records or other information, wherever located, required by any [proper] order of the [Commission].[82]

Thus the House provision would have required the conferences expressly to include in their agreements a provision that would permit the Commission access to self-policing records and documents, wherever located, as a condition to obtaining the Commission's approval of these agreements under section 15.

Opposition to the access provision was intense and widespread. During the extensive hearings held before the House and Senate subcommittees, representatives of several foreign maritime nations, carriers under these foreign flags, as well as a number of American-flag

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[82] *See* H.R. REP. No. 498, 87th Cong., 1st Sess. 40 (1961) (H.R. 6775). The House also included a similar provision to amend section 21 of the Act, 46 U.S.C. § 820, which applies to ocean common carriers serving the foreign commerce of the United States. *See* H.R. REP. No. 498, 87th Cong., 1st Sess. 44 (1961). The Senate deleted this provision, *see* S. REP. No. 860, 87th Cong., 1st Sess. 44 (1961), but made no move

carriers, made known their objections to the provision.[83] The foreign maritime nations resented what they perceived to be an attempt by the United States to regulate unilaterally an entire international industry. Considering the House provision a direct infringement on their sovereignties, several of these governments lodged protests with the State Department, indicating in the strongest possible language that these nations would rather the conferences dissolve than permit their nationals to comply with requests for production of documents by the Commission.[84] Many of the American-flag carriers —anxious to retain the conference system which if adhered to would set rates higher than would otherwise prevail in the market and thus enable them to compete more effectively against the low-cost foreign carriers—also resisted the access proposal.[85] Thus beset

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to amend that section to withdraw from the Commission the authority to obtain documents located abroad, which two courts had already found to exist. *See* note 89 *infra* and accompanying text.

[83] *See, e.g., Senate Hearings on H.R. 6775, supra* note 14, at 10, 48-50, 52-70, 79-81, 103-04, 155, 253, 462-64, 539-45, 646-47, 654, 682-83, 686, 706-07; *Hearings on H.R. 4299 Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 1st Sess. 134-35, 140-44 (1961) [hereinafter cited as *House Hearings on H.R. 4229*].

[84] *See, e.g.*, S. REP. NO. 860, 87th Cong., 1st Sess. 3, 25; 107 CONG. REC. 19,304, 19,305-07 (1961) (Senate debate on H.R. 6775).

[85] *See, e.g., Senate Hearings on H.R. 6775, supra* note 14, at 102-05. *But see id.* at 517-18; *House Hearings on H.R. 4229, supra* note 83, at 370-71 (statements of representative for independent American-flag carrier). Testimony before the House and Senate predicted that if a breakup of the conference systems were to occur, the high-cost American-flag ships—even though buoyed by operating and construction-differential subsidies, *see, e.g.*, note 12 *supra* and accompanying text—would be unable to compete with the foreign

with severe doubts concerning both the continued existence of the conference system if the access proposal were enacted as well as the feasibility of enforcing such a proposal in view of strong foreign opposition, the Senate Committee deleted the provision from the House bill that eventually was passed by Congress.[86]

At the same time that the Senate was considering the House proposal, however, it also was aware of two circuit court decisions, one of which was written by this court, that had interpreted section 21 of the Shipping Act to allow the Commission to compel ocean common carriers subject to the Act to produce documents located outside the territorial confines of the United States.[87]

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carriers. *See, e.g., House Hearings on H.R. 4229, supra* note 83, at 23, 42-43 (statement of Chairman of FMB); 107 CONG. REC. 19,304, 19,306 (1961) (Senate debate on H.R. 6775); S. REP. No. 860, 87th Cong., 1st Sess. 3 (1961).

[86] In striking the House proposal, the Senate commented:

> Your committee deleted from the bill a provision which would have amended section 15, Shipping Act, 1916, to require that all agreements approved under that section (1) designate an agent in the United States for the receipt of process effective against the signatories to the agreement; and (2) provide that every such signatory shall furnish the Commission "records or other information," wherever located in compliance with Commission orders. This provision was so vigorously opposed, and for good reasons, by practically all interested parties except the Federal Maritime Board, that we deleted it.

S. REP. No. 860, 87th Cong., 1st Sess. 17 (1961).

[87] *See Montship Lines, Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 147 (D.C. Cir. 1961); *Kerr Steamship Co.* v. *United States*, 284 F.2d 61 (2d Cir. 1960), *vacated on other grounds*, 369 U.S. 422 (1962). Section 21 provides in relevant part:

> The [Commission] may require any common carrier by water, or other persons subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it . . . any periodical or special report, or any

Although section 21 contained no express authorization to the Commission to require the production of documents located abroad, these courts found that such power should be implied in light of the scope and purpose of the Act. Reasoning that Congress intended to subject both American and foreign-flag carriers to regulation under the Shipping Act, the courts concluded that imposing a territorial limitation on the Commission's investigatory powers under section 21 impermissibly would impede the Commission's regulatory responsibilities.[88]

Under these decisions, then, the Commission was found to possess the power, pursuant to section 21 of the Act, to obtain documents located outside the territorial confines of the United States. Congress clearly was unwilling to invest the Commission, under section 15 of the Act, with similar power; yet, it also made no move to amend section 21 to withdraw from the Commission the authority that the courts had found to inhere in that section.[89] Thus while Congress declined to place an additional investigatory tool at the Commission's disposal under section 15 of the Act, it also did not disaffirm or disturb any of the Commission's existing investigatory techniques.

> account, record, rate, or charge, or any memorandum of any facts and transactions pertaining to the business of such carrier or other person subject to this Act.

46 U.S.C. § 820 (1976).

[88] *See Montship Lines, Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 147, 153-154 (D.C. Cir. 1961); *Kerr Steamship Co.* v. *United States*, 284 F.2d 61, 63-64 (2d Cir. 1960), *vacated on other grounds*, 369 U.S. 422 (1962).

[89] Referring to the two appellate decisions in its committee report, the Senate stated:

> To date two U.S. courts of appeal have held that under the present section 21, Shipping Act, 1916, the Commission may lawfully order foreign flag ocean common carriers serving U.S. ports, inbound or outbound, to furnish

We perceive no incompatibility between the legislative history of the 1961 amendments and section 528.1(c). Contrary to petitioners' construction of the rule, it does not require the self-policing entities affirmatively to place self-policing records at the Commission's disposal as a condition to Commission approval of the conference agreements—such a requirement clearly would run contrary to the legislative history of the 1961 amendments.[90] Instead, section 528.1(c) provides only that the conferences may not include in their agreements any provision that automatically would preclude the Commission, through whatever tools it may have, from obtaining self-policing records and documents.

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documents in compliance with lawful section 21 orders, even though the documents are located in foreign countries. How the United States will be able to enforce such orders in the face of directives not to produce from five friendly maritime nations (Belgium, Italy, Japan, the Netherlands, and the United Kingdom) is a question of great foreign policy importance. Certainly, we would only muddy the waters and do violence to our foreign policy were we to leave such provisions in the bill. Furthermore, we are convinced that if we did so a number of steamship conferences wou' have to dissolve since a number of foreign lines would be compelled by their governments to withdraw, rather than submit to the receipt-of-process and document-production pledge required by the language of the bill.

S. REP. No. 860, 87th Cong., 1st Sess. 25 (1961).

[90] In the notice of proposed rulemaking in Docket No. 73-5 (issued on 23 February 1977), the Commission included a provision that would have required the conferences and rate agreements to maintain copies of all self-policing records in the United States, available for the Commission's inspection. *See* 38 Fed. Reg. 4982, 4984, 4987-88 (1973). When the Commission instituted another rulemaking proceeding in Docket No. 73-64 to consider the issues related to the self-policing systems, it also included a similar access-to-records proposal. *See id.* at 28,841, 28,842 (section 528.2), *reprinted in* J.A. at 10, 17. In response to vigorous industry opposition, the Commission deleted the access provision when it promulgated its April rules.

In other words, we interpret the rule to mean that the conference agreements may not prohibit the members or the self-policing entities from making self-policing information available to the Commission, whether this information is submitted voluntarily or otherwise obtained by the Commission through whatever leverage the Commission may be able to exert. The rule on its face does not purport to authorize broader access by the Commission to documents than is already recognized under existing law; nor does it purport to preclude the conferences from raising any valid defense to an order to produce in the event the Commission requests self-policing records.

In short, the rule only prevents the conferences from agreeing in advance that they will not allow the Commission access to self-policing records and documents. And nothing in the legislative history of the 1961 amendments requires the Commission to approve conference agreements that erect insurmountable obstacles to any attempt on the part of the Commission to obtain self-policing information.

To deprive the Commission of any opportunity to gain access to this type of information would be inconsistent with the Commission's recognized regulatory responsibilities. Confronted with over two hundred violations of the rate fixing agreements and of the Shipping Act uncovered by the Celler Committee in a relatively short period, one of Congress's primary objectives in enacting the 1961 amendments was the elimination of malpractices in the industry.[91] To that end, Congress bolstered the Commission's responsibilities under section 15, assigning to the Commission the task of assuring that the conferences police their members adequately. In addition to its supervisory responsibilities, the Commission has the statu-

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[91] *See, e.g.*, notes 16-20 *supra* and accompanying text.

tory obligation of enforcing the Shipping Act, including, for example, those provisions which prohibit ocean common carriers from granting to shippers rebates or unreasonable preferences or advantages to secure the business of a shipper.[92] Although Congress did not resolve precisely the relation between the Commission's obligation to enforce the Shipping Act and the conferences' duty to regulate their members,[93] Congress made it clear that the self-policing clause would not subtract in any way from the powers, duties, and responsibilities of the Commission.[94] The 1961 amendments thus expanded the Com-

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[92] *See* Shipping Act §§ 14, 16, 46 U.S.C. §§ 812, 815 (1976); note 81 *supra*. We note that we discern nothing in the legislative history of the 1961 amendments to the Shipping Act that would require a strict bifurcation of the Commission's supervisory and enforcement obligations, and petitioners do not contend otherwise. *See also Montship Lines, Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 147, 153 (D.C. Cir. 1961) (no basis in Shipping Act for bifurcation of Commission's enforcement and supervisory functions under section 21 of the Act, 46 U.S.C. § 820).

[93] The practical effect of imposing on the conferences the self-policing mandate in the 1961 amendments was to give the conferences concurrent responsibility with the Commission for enforcing the Act. How that responsibility was to be shared emerged as an issue of considerable concern in the hearings before the Senate and House Subcommittees on the 1961 amendments. Industry representatives strongly objected to any attempt to use policing bodies as auxiliary investigatory arms of the Commission. Their principal concern underlying this objection was the threat of being penalized for violations of the Shipping Act and rate fixing agreements by both the self-policing body and the Commission for the same conduct. *See, e.g., Senate Hearings on H.R. 6775, supra* note 14, at 646-47, 654, 682-83, 686, 706-07.

[94] *See, e.g.*, H.R. REP. No. 498, 87th Cong., 1st Sess. 10-11 (1961); note 21 *supra* and accompanying text. Thus, we reject petitioners' contention, as inconsistent with the Commission's recognized obligations under the Shipping Act, that the Commission's use of data acquired from the policing

mission's supervisory responsibilities and left its enforcement responsibilities firmly intact. To provide the Commission with the means of implementing these substantive responsibilities, Congress also broadened considerably the Commission's rulemaking powers.[95]

Diligent performance of the Commission's duties to monitor the conferences' policing attempts and to enforce the Shipping Act demands that the Commission keep itself informed of actual occurrences and practices in the ocean shipping industry. If the conferences, through their agreements, could block in advance any Commission attempt to gain access to self-policing documents, the Commission's ability to obtain reliable information concerning conditions in the trades severely would be restricted and, as an obvious corollary, the Commission's ability to perform its regulatory responsibilities would be impaired severely. Section 528.1(c) is a legitimate effort on the part of the Commission to prevent this from occurring.

In view of the limited scope of the rule and the posture of this case, we also find petitioners' other objections to the rule to be unfounded. Petitioners contend section 528.1(c) should be struck as imposing a potential requirement that may be enforced easily against the American-flag lines, but, in view of uncooperative foreign governments and their nationals, not against their relatively unreachable foreign competitors. Specifically, petitioners claim that not only will member lines be unwilling to cooperate with policing authorities' requests for production of documents if those documents then may be obtained by the Commission, but that foreign govern-

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authorities will interject the Commission into the monitoring activities of those bodies and as a consequence frustrate congressional intent that the conferences engage in self-regulation.

[95] *See, e.g.*, note 23 *supra* and accompanying text.

ments will also prohibit their nationals from disclosing such confidential business records.

Although we have held in *Alcoa Steamship Co.* v. *Federal Maritime Commission*[96] that the Commission, consistent with the policy of promoting an American merchant fleet, may not adopt regulations that would place an unequal burden on American-flag carriers in relation to their foreign-flag competitors,[97] section 528.1 (c) on its face does not run afoul of this substantive limitation on the Commission's powers. To reiterate, section 528.1(c) only prevents the conferences from inserting in their agreements any provision that would prevent the Commission from obtaining access to self-policing records or documents; no order for the production of documents is even remotely at issue in this case.[98] The assertion that American-flag lines will bear unequally the burden of section 528.1(c) is purely conjectural in the context of this case and, as such, is not an issue appropriately considered by this court.

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[96] 348 F.2d 756 (D.C. Cir. 1965).

[97] *Id.* at 761. We also note that in *Alcoa Steamship Co.*, this court stated that the legislative history confirmed our decision in *Montship Lines, Ltd.* v. *Federal Maritime Bd.*, 295 F.2d 147, 153 (D.C. Cir. 1961), which interpreted section 21 of the Act to require ocean common carriers to produce documents located outside the territorial confines of the United States—despite objections raised in *Montship* that such requests would be unenforceable. *See Alcoa Steamship Co.* v. *FMC*, 348 F.2d at 761 n.28.

[98] Thus we reject petitioner Trans-Pacific's claim that section 528.1(c) violates the fourth amendment protection against unreasonable searches and seizures. The short answer to petitioner's objection is that the present case presents no question of an actual search and seizure; it raises only the question of the validity of the Commission's exercise of its rulemaking powers. *See, e.g., Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195, 208 (1946).

Our response to petitioners' next objection is similar. Trans-Pacific and Sea-Land claim that if the Commission uses documents acquired from the self-policing entities to discharge its enforcement obligations, the carriers will be subject to penalties from both the conference policing body and the Commission for the same conduct or transaction. As a result, petitioners predict that, to avoid the threat of double sanctions, carriers will withdraw en masse from the conference. Again, petitioners' argument rests solely on speculation: no order for the production of documents is at issue in this case.

We note, moreover, that in the event the Commission does seek to acquire self-policing records and documents, the Commission—to dispel just this concern over double penalties—has stated in its final rules that it would "afford significant weight to any self-policing damages paid by a carrier when the same conduct of that carrier becomes the object of an FMC civil penalty claim. As a minimum, credit shall be given for damages paid under a self-policing system." [99] Finding petitioners' contentions unavailing, we are persuaded that the promulgation of section 528.1(c) was a proper exercise of the Commission's rulemaking authority under the Shipping Act.[100]

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[99] Reconsideration and Modification of Final Rules, 43 Fed. Reg. 42,757, 42,759 (1978), *reprinted in* J.A. at 729, 742-43. The Commission also stated: "In the case of isolated, less serious Shipping Act violations, no civil penalty claim shall be pursued when the carrier has cooperated fully with the Commission and reasonable self-policing penalties have been paid." *Id.*, J.A. at 743.

[100] Section 528.1(c) seems a particularly prudent exercise of the Commission's rulemaking powers in view of the current conditions in the industry. Despite congressional insistence on adequate policing, the awarding of secret rebates to shippers in violation of agreed-upon rate schedules has remained a chronic problem, and the conferences' efforts to curb these violations have been largely ineffectual. *See, e.g.*, notes 51-53 *supra* and accompanying text. Moreover, the re-

2. *Procedural Challenges to Section 528.1(c)*

Having disposed of the substantive objections to the Commission's promulgation of section 528.1(c), we must consider petitioners' argument that the Commission's rulemaking proceedings failed to afford interested parties the opportunity to make informed comments and criticisms on that section.[101] Petitioners' criticism turns on the fact that the Commission deleted a provision from the April "Final Rules," which would have required the self-policing systems to provide the Commission upon request with copies of self-policing records [102] and then promulgated its actual final rules on 14 September 1978, which included section 528.1(c). Sea-Land and Trans-Pacific argue that because an access-to-records provision was deleted from the April rules, under section 4(b)(3) of the APA [103] the Commission was precluded from adopting section 528.1(c), a similar provision cast in negative terms, without affording interested parties an additional opportunity for notice and comment. We disagree.

Briefly recalling the sequence of events leading to the Commission's promulgation of its September rules, the Commission issued a notice of proposed rulemaking on 23 February 1973 (Docket No. 73-5) to revise regulations

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ports submitted by the self-policing bodies to the Commission under former General Order 7 have indicated not at all the true state of the industry. *See id.*

[101] We have also given due consideration to petitioner Trans-Pacific's bald assertion that the Commission in adopting its final rules failed to follow its procedures adopted pursuant to the Government in Sunshine Act, 5 U.S.C. § 552b (1976), *see* 46 C.F.R. § 503.70 (1978). We find this contention to be without substance.

[102] *See* 38 Fed. Reg. 28,841, 28,842 (1973) (section 528.2), *reprinted in* J.A. at 10, 17.

[103] Administrative Procedure Act § 4(b)(3), 5 U.S.C. § 553(b)(3) (1976).

dealing generally with section 15 agreements and to amend the regulations pertaining particularly to the conference self-policing systems.[104] That notice included a provision that would have required the conferences and rate agreements to maintain copies of all records of self-policing activities, which then would be available for the Commission's inspecton, in the United States. The proposed rule also required that the identity of parties found to have violated a rate agreement be disclosed to the Commission following the final disposition of a disciplinary proceeding conducted by the self-policing authority.[105]

On 17 October 1973 the Commission instituted another rulemaking proceeding (Docket No. 73-64) to consider separately the issues related to the self-policing systems.[106] These proposed rules also included a provision that would have required every self-policing system to furnish the Commission upon request with a copy of all self-policing records. Although the access proposal was amended to permit the self-policing bodies to delete the names of the parties involved in the investigation and adjudicatory proceedings,[107] the Commission substituted a requirement of an identifying code for each conference member.[108]

Public comments were solicited and received including comments from petitioners. Hearing counsel for the Commission responded to these comments, and eight more sets of comments were filed on behalf of the conferences and rate agreements. On 18 April 1978 the Commission promulgated its April rules, and in response to industry opposition, deleted the access-to-records provision.

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[104] 38 Fed. Reg. 4982 (1973).

[105] *Id.* at 4984, 4987-88.

[106] *Id.* at 28,841.

[107] *Id.* at 28,842 (section 528.2), *reprinted in* J.A. at 10, 17.

[108] *Id.* at 28,843 (section 528.4), *reprinted in* J.A. at 10, 20.

Nineteen petitions for reconsideration of the April rules were filed. On 14 September 1978 the Commission, without allowing additional notice and opportunity for comment, adopted the final rules which included the provision at issue, section 528.1(c).

While petitioners were not provided additional notice and opportunity to comment on section 528.1(c) prior to its adoption, we believe that interested parties were afforded sufficient opportunity to make informed criticisms on all conceivable issues raised by the rule during the course of the rulemaking. Petitioners were twice on notice that the Commission was contemplating the adoption of an access-to-records provision: both the notices of proposed rulemaking in Dockets Nos. 73-5 and 73-64, an outgrowth of the prior proceeding, contained this requirement. This requirement was cast in the affirmative; whereas section 528.1(c) is cast in negative terms, prohibiting the conferences from inserting in the conference agreements any provision that would deny the Commission access to copies of self-policing records. The subject matter of the two types of provisions, however, is the same—the availability to the Commission of self-policing records and documents.

Taking a commonsense approach to section 4(b)(3) of the APA,[109] it is hard to conceive how petitioners may claim that they were not provided sufficient notice and opportunity to comment on all potential issues raised by section 528.1(c). Interested parties, including petitioners, availed themselves of the opportunity to comment on the access requirement initially noticed in Docket Nos. 73-5 and 73-64, assailing the proposed provisions on the same grounds that petitioners now attack section 528.1(c).[110]

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[109] *See* notes 57-58 *supra* and accompanying text.

[110] *See, e.g.*, J.A. at 29-32, 36-46, 51-56, 62, 64-65, 81-82, 84-88, 95, 98-113, 123, 138-40, 146-49, 152-54.

Petitioners' complaint, when examined closely, seems to be not that as a practical matter it was deprived of a meaningful opportunity to submit informed comments on section 528.1(c), but that once the Commission seemingly accepted the petitioners' arguments by deleting the access proposal from the April rules, it was precluded from thereafter changing its position. This notion misconstrues the purpose of the notice and comment requirement: it is intended to allow interested parties the chance to make informed criticisms, not to afford those persons with a "right" to insist that a rule take a particular form.[111] We conclude therefore that the Commission satisfied the requirements of section 4(b)(3) of the Administrative Procedure Act.

Under section 4(b)(2) of the APA, an agency is also directed to include in its notice of proposed rulemaking a reference to the legal authority under which the rule is proposed.[112] Reference to the enforcement provisions of the Shipping Act, sections 14, 16, 18(b),[113] for the authority to adopt section 528.1(c), however, was first included in the Commission's publication of its final regulations. Although the Commission technically was not in compliance with section 4(b)(2), we believe that the defect in the notice of proposed rulemaking was not fatal.

The proposed rules in Docket No. 73-5 contained a requirement that the self-policing records submitted to the Commission disclose the identity of carriers found to have violated a rate agreement. In Docket No. 73-64 the Commission amended the access proposal to allow the self-policing bodies to delete the names of the parties in-

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[111] *See, e.g., Pacific Coast European Conference* v. *United States*, 350 F.2d 197, 205 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965).

[112] 5 U.S.C. § 553(b)(2) (1976).

[113] 46 U.S.C. §§ 812, 815, 817(b) (1976).

volved in any disciplinary proceeding; however, the Commission substituted a requirement of a coded identification for each of the conference members.[114] Many of the comments received by the Commission in Docket No. 73-64 were directed to the concern that the Commission could use self-policing data acquired under an access proposal to discharge not only its supervisory functions under section 15 of the Shipping Act, but its enforcement obligations as well.[115] Thus, prior to the publication of the final rules, interested parties availed themselves of the opportunity to comment on the relationship between an access proposal and the Commission's enforcement duties. Given the similar subject matter involved in an access proposal and section 528.1(c), we do not think petitioners were prejudiced by the Commission's failure to include specific reference to the enforcement sections of the Act until the actual promulgation of section 528.1(c).

3. *Rationality of Section 528.1(c)*

Again, after concluding that the Commission acted within its statutory authority in promulgating the challenged rule and that this action was preceded by the requisite procedural safeguards and was supported by sufficient evidence, our review is limited to determining whether the agency's action was rational and based upon a consideration of the relevant factors.[116] Congress has

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[114] *See* notes 105, 107-08 *supra* and accompanying text.

[115] *See, e.g.*, J.A. at 29-32, 36-46, 52-56, 64-65, 81-82, 95, 98-113, 138-40, 146-49, 152-54.

[116] *See* notes 70-73 *supra* and accompanying text. Trans-Pacific makes the argument that the Commission failed to consider the risk that the conference system may disintegrate if the Commission is permitted to acquire self-policing data. The Commission, however, evaluated this threat against the substantial advantage that would be lost to the foreign car-

charged the Commission with both the "well-nigh impossible task of policing certain proscribed activities, regardless of whether they occur in New York or Bombay" [117] as well as with the equally difficult task of overseeing the conferences' attempts at self-regulation covering the same global expanse. For the Commission to discharge either of these tasks with any measure of success, it must be permitted the opportunity to gain access to those records and documents—wherever located—that reflect actual occurrences and practices in the shipping industry. We hold therefore that section 528.1 (c) is a rational means of implementing the Commission's dual responsibilities under the Shipping Act.

III. Conclusion

Finding the challenged rules to be a proper exercise of the Commission's authority under the Shipping Act, we hold that the order is

Affirmed.

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riers if they were to withdraw from the conferences—exemption from our antitrust laws.

Given the posture of this case, it would be inappropriate for the court at this time to undertake an evaluation of whether the Commission erred in its assessment of the probable effect of adopting section 528.1(c).

[117] 107 Cong. Rec. 19,304, 19,309 (1961) (Senate debate on H.R. 6775; remarks of Sen. Butler).

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MARKEY, *Chief Judge*, United States Court of Customs and Patent Appeals,* dissenting: With utmost respect, I dissent. In my view, the plain language of section 15 and its legislative history establish that Congress withheld authority from the Commission to do what it has here done, that is, to prescribe in advance specific and "effective" policing systems and procedures. I cannot agree that such authority inheres in section 43 coupled with section 15, or that section 43 has always been available to implement section 15, in the manner here attempted, at the option of the Commission.

In sum, we deal here not with the more common question of whether an agency action is within its delegated authority but with one of whether the challenged action is directly contrary to congressional limitations on its authority. Little has been seen or heard in recent times of the once strong requirement for clear standards when Congress delegates its legislative authority. When Congress does meet its obligation to establish a clear standard, as it has here, a concomitant obligation to enforce that standard devolves upon the courts, whatever may be the judicial view of the wisdom or practicality of that standard.

I. SECTION 15 AND THE CHALLENGED RULES

The self-policing provision in section 15 authorizes the Commission to disapprove a conference agreement, after notice and hearing, on a finding of inadequate policing or an absence of complaint procedures.[1] Approval is im-

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] 46 U.S.C. § 814 (1976) reads in pertinent part:

> The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal

portant because conference members operating under approved agreements enjoy a privileged immunity from our antitrust laws.

The challenged rules dictate, for the first time, a plethora of detailed conference agreement provisions, and pre-condition approval on the presence of those provisions.[2] The nature of a uniform self-policing system, and the manner of operating it, are spelled out in rigid detail.

In complying with rule 528.1(b), all conference members and parties to rate agreements must engage (and pay for) both an independent policing authority and an impartial "arbitrator." The agreement must describe the function and powers of the authority and the arbitrator. Under rule 528.1(c), no self-policing system may contain a provision purporting to deny access to self-policing records contra an order of the Commission. Under rule 528.2, agreements must contain specified provisions on breaches, permissible damages, investigation of breaches, adjudication of breaches, procedural guarantees, and a designated official. Rules 528.3 and 528.4 set forth detailed requirements governing the nature and functions of policing authorities and impartial arbitrators, respectively. Rule 528.5 establishes elaborate reporting requirements.

Thus the challenged rules prescribe the self-policing provisions for all future conference agreements. Absent waiver (discussed below), agreements failing to meet any of the rules will be automatically disapproved.

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to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

[2] 46 C.F.R. § 528 (1978).

II. Absence of Commission Authority

A. *Adjudicatory* vs. *Rulemaking Authority*

Section 15 authorizes the Commission to disapprove an agreement, *after notice and hearing*, on a finding of inadequate policing of its obligations or an absence of procedures. That authority presupposes a factual determination in each case. It is not an authority to prescribe in advance the precise kind of policing system all must adopt and the specific, detailed manner of operating that prescribed system.

Section 15, granting adjudicatory, not rulemaking, authority, envisages individual fact situations surrounding individual agreements reviewed individually. If action under "any" agreement appears wanting, the Commission must follow a notice-and-hearing procedure before disapproving that agreement. The challenged rules would finesse the notice-and-hearing requirements for all nonconforming agreements, and would unlawfully substitute the Commission's concept of policing for that of those affected. Whether a conference was in *fact* adequately policing member obligations under an agreement would become irrelevant in any case in which the agreement lacked one of the Commission's prescribed provisions. The challenged rules thus nullify the statutory concept of *self*-policing.[3]

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[3] Fully conscious of the salutary injunction under which we review the authority, not the wisdom, of Commission action, I nonetheless note in passing the notion implicit in the challenged rules that all conferences present the same situation. But some conferences are large; some are small. Some are economically stable; others are not. The dollar volume of trade is many times larger in some than in others. Malpractices may abound in some and be absent from others. Conditions change. Because numerous factors distinguish the policing needs of conferences and rate agreements from one another, and because the international scope of shipping makes governmental policing impractical, Congress envisaged

B. *Rule 528.1(c)*

Rule 528.1(c) is particularly egregious:

> (c) No self-policing system shall contain provisions which purport to:
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> (1) deny access to or copies of any self-policing records, statistics, reports, or other information (including the identity of members) in contravention of a duly issued order of the Federal Maritime Commission (or a Commission employee with delegated authority to issue such orders); or
>
> (2) preclude any of its members from disclosing the nature and extent of their *own* involvement with the self-policing authority (*e.g.*, any damages paid by the member) in any administrative or judicial proceeding to enforce the Shipping Act.

As recognized in *States Marine Lines, Inc.* v. *Federal Maritime Commission*, 376 F.2d 230, 238 (D.C. Cir. 1967), carriers, fearing retaliation, will not complain against each other unless assured of confidentiality. That the rule was converted from positive to negative terminology does not change its confidentiality-destroying effect. Hence, rule 528.1(c) can serve only to frustrate

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policing systems voluntarily adopted and tailored by the members of a given trade to fit the needs of that trade, that is, *self-policing* systems. In my view, the challenged rules eradicate the discretion and flexibility essential to effectively tailored and necessarily varied systems of self-policing.

Similarly, the Commission and the majority opinion make it clear that at least some, if not all, of the challenged rules are "good ideas," insofar as they aid the Commission in its enforcement role under the Shipping Act. As indicated, our concern is not with whether a rule is a "good" or "bad" idea, but with whether a rule is authorized. Unauthorized rules, however wise or useful or effective, can never in law be "good."

efforts to achieve effective self-policing and lead to demise of the conference scheme. If that view be considered conjecture, it is, as discussed below, a congressional conjecture, accepted and employed as a basis for limiting the Commission's authority under section 15. A concern for potential implications and effects of the rule can hardly be viewed as "premature" when that very concern formed the basis for congressional enactment of the statute.

A holding that rule 528.1(c) is beyond the authority granted the Commission under section 15 would not deprive it of opportunity to gain appropriate access to self-policing information needed to make the finding required by section 15. Such a holding would merely require the Commission to follow the statute under which it must conduct a hearing, and make a finding of inadequate policing, before it disapproves an agreement. Prohibiting the members of a conference from including in their agreement "provisions which purport to" deny Commission access to certain information may or may not be a good idea. It may or may not be irrelevant, given the unlikelihood that such provisions could in themselves be determinative in a test of a "duly issued" Commission order. In any case, the rule is a legislative (rulemaking) prior dictation of the content, or noncontent, of a conference agreement, not the adjudicatory determination of approval/disapproval authorized by section 15. Its result is a prior disapproval of all agreements having such provisions, *without* the finding of inadequate policing, *after* notice and hearing, required by section 15.[4]

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[4] It will not do, in this case, to say that the Commission could disapprove agreements having such provisions and therefore is merely doing all at once what it could do serially. It has, in my view, no authority to disapprove an agreement *unless*, after hearing, it finds inadequate policing or lack of

The Commission announced its intention to use information obtained under rule 528.1(c) to base civil penalty claims on the same actions for which a neutral body has previously assessed damages.[5] The rule, and the Commission's intended action under it, bear no relation whatever to section 15. Under that section, the Commission is responsible for determining whether a particular conference is performing an adequate self-policing function. If it is not, the Commission is obliged to disapprove the underlying conference agreement. If it is, there is no basis for disapproving the agreement. In either case, the Commission's role under section 15 is at an end when it makes its finding and either approves or disapproves the agreement.

Indeed, and incongruously, the Commission intends to use evidence that a conference *is* policing its members, that is, evidence of assessment of damages under its self-policing system, as a basis for civil penalty claims under the Shipping Act. The Commission has authority under section 15, after notice and hearing, to disapprove an agreement if it finds inadequate policing in spite of damage assessments. To use a conference's self-policing actions as a basis for penalties, however, creates a classic "catch 22," in which a conference is doomed by its successes. Rule 528.1(c) is in my view a misuse of the Commission's authority to disapprove conference agree-

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reasonable complaint procedures. That a re-writing of section 15, contrary to express congressional limitation, would facilitate the Commission's activities under section 21 is, I think, irrelevant.

[5] 43 Fed. Reg. 42,759 (1978). That the Commission will, under its Final Rules, "afford significant weight" and "credit" for self-policing damages paid, and will forgo further penalties for "isolated, less serious" Shipping Act violations of cooperative carriers who have paid those damages, may reflect a compassionate approach; it does not create authority for the challenged rules.

ments under section 15. That section was never intended as a mechanism by which the Commission could, under threat of agreement disapproval, achieve collateral enforcement of the Shipping Act.[6]

C. *Legislative History*

The legislative history of the 1961 Amendments to the Shipping Act illustrates the limitations on Commission authority residing in the self-policing provisions of section 15.

The House-passed bill, H.R. 6775, included a requirement that "[n]o conference agreement shall be approved unless the Board [Commission] finds that it contains effective provisions for policing the obligations under it." H.R. Rep. No. 498, 87th Cong., 1st Sess. 40 (1961). That bill was introduced in the Senate where hearings were conducted, and extensive testimony was received in opposition to the authority to prescribe "effective" provisions.[7]

Subsequently, the Senate Report accompanying the bill said:

> We also deleted a provision which would have amended section 15 to require that no conference agreement could be approved unless the Commission found that the agreement contained "effective" provisions for policing the obligations under it. Your com-

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[6] The current rules can be viewed as creating a framework in which neutral bodies act as "little FMC's," collecting and passing information to the Commission for collateral enforcement purposes. That the challenged rules would ease the Commission's burdens of enforcement of the Act cannot alone, however, confer authority to promulgate those rules.

[7] Hearings on H.R. 6775 Before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, United States Senate, 87th Cong., 1st Sess. 631, 649, 654, 676, 684-86, 712 (1961).

> mittee's amendment would require the Commission to disapprove any conference agreement if it found, after notice and hearing, that as among the members there had been inadequate policing and enforcing of their obligations under the agreement.[8]

As this court said in *Outward Continental North Pacific Freight Conference* v. *Federal Maritime Commission*, 385 F.2d 981, 984 n.7 (D.C. Cir. 1967), Congress objected to the requirement that *effective* provisions be included *before* the agreements could be approved in 1961.[9] There is a clear and essential difference between authority to disapprove agreements for lack of effective provisions and authority to disapprove agreements only upon a finding, "after notice and hearing," that, "as among the members" signatory to the agreement under review, "there had been inadequate policing."

Commission authority to prescribe in advance specific policing systems and procedures was thus considered and rejected during the legislative process. In light of that clear indication of congressional intent, I cannot agree that the Commission may do under guise of its rulemak-

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[8] S. REP. No. 860, 87th Cong., 1st Sess. 17-18 (1961).

[9] Permeating the Commission's position, and the majority opinion, is the notion that Congress' objection was somehow only temporary, *i.e.*, that Congress intended that the Commission merely "try" operating under its statutory authority, and, if that didn't work, the Commission was free to ignore the objection of Congress and go its own way, doing whatever it wished in an effort to achieve the broad congressional goal of effective self-policing. I can nowhere find the slightest evidence, in the legislative history or elsewhere, in support of that notion. Congress did *not* say "Try this and see if it works; if it doesn't, do as you like." If an agency is frustrated by specific congressional limitations on its authority, it should seek congressional removal of those limitations. It should not seek removal by a court, on an argument that Congress really didn't mean what it specifically said.

ing powers precisely that which Congress declined to permit it to do within its adjudicatory powers as granted in section 15.

The legislative history relative to rule 528.1(c) is equally fatal to a finding of authority for that rule. The House bill contained a provision requiring carriers to provide records to the Commission upon order. H.R. Rep. No. 498, 87th Cong., 1st Sess. 40 (1961). During the Senate hearings there was virtually uniform opposition to that initial requirement, and it was deleted from the version of the bill finally reported to the Senate:

> Your committee deleted from the bill a provision which would have amended section 15, Shipping Act, 1916, to require that all agreements approved under that section . . . provide that every such signatory [to the agreement] shall furnish the Commission "records or other information," wherever located in compliance with Commission orders. This provision was so vigorously opposed, and for good reasons, by practically all interested parties except the Federal Maritime Board, that we deleted it.[10]

Rule 528.1(c) would now insure the same Commission access to self-policing records that Congress specifically refused to authorize.

I cannot agree that there is a "contradiction" in comparing: (1) the Senate Committee's deletion of the access to records provision, and (2) the Senate's awareness of two circuit court decisions[11] which had interpreted section 21 of the Shipping Act[12] to allow Commission access

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[10] S. REP. No. 860, 87th Cong., 1st Sess. 17 (1961).

[11] *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 153-54 (D.C. Cir. 1961); *Kerr Steamship Co. v. United States*, 284 F.2d 61, 63-64 (2d Cir. 1960), *vacated on other grounds*, 369 U.S. 422 (1962).

[12] 46 U.S.C. § 820 (1976).

to documents located abroad. The Senate specifically referred to the two appellate decisions in its committee report, saying:

> To date two U.S. courts of appeal have held that under the present section 21, Shipping Act, 1916, the Commission may lawfully order foreign flag ocean common carriers serving U.S. ports, inbound or outbound, to furnish documents in compliance with lawful section 21 orders, even though the documents are located in foreign countries. How the United States will be able to enforce such orders in the face of directives not to produce from five friendly maritime nations (Belgium, Italy, Japan, the Netherlands, and the United Kingdom) is a question of great foreign policy importance. Certainly, we would only muddy the waters and do violence to our foreign policy were we to leave such provisions in the bill. Furthermore, we are convinced that if we did so a number of steamship conferences would have to dissolve since a number of foreign lines would be compelled by their governments to withdraw, rather than submit to the receipt-of-process and document-production pledge required by the language of the bill.[13]

Thus, with clear knowledge and understanding of the two circuit court decisions, Congress, as it had a perfect right to do, rejected a requirement that carriers must permit Commission access to self-policing records and documents, *as a condition for section 15 approval.* That same requirement should not now be unlawfully resurrected by promulgation of rule 528.1(c). That would, as would all unlawful conduct of government agencies, diminish severely that public respect which forms the lifeblood of both the legislative and the regulatory processes. Where, as here specifically recognized by the Congress, the requirement would "do violence to our foreign policy," and

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[13] S. REP. No. 860, 87th Cong., 1st Sess. 25 (1961).

lead conferences to "dissolve," its approval would constitute an extra blood-letting least affordable by a government necessarily resting on respect of the people.

D. *Section 43*

Apparently recognizing an absence of legal foundation for the challenged rules in section 15, the Commission relies heavily on the broad language of section 43 reading "[t]he Commission shall make such rules and regulations as may be necessary to carry out the provisions of this chapter." [14] Reliance on that blanket provision, however, begs the question whether the Commission was statutorily empowered to do what it did here.

Of course the Commission has and should have broad rulemaking authority. The breadth of its rulemaking powers cannot, however, be so great as to enable the Commission to do what Congress specifically objected to its doing.

Moreover, the Commission has not shown how the challenged rules can be said to be "necessary to carry out" any provision of section 15. The language of that section requires a finding of inadequate self-policing, *after notice and hearing*, before an agreement can be disapproved. Thus, if there be a relationship between sections 15 and 43, in the context of the challenged rules, that relationship is one of conflict, not necessity. The Commission, in promulgating the challenged rules, is using section 43 to grant itself a basis for disapproving agreements not only not available to it under section 15 but denied to it in the legislative history of that section. Because the latter section is specific in spelling out the basis on which the Commission may disapprove an agreement, the Commission must be limited to that basis and cannot use a boiler-plate rulemaking section to effectively

[14] 46 U.S.C. § 841a (1976).

write into section 15 a new basis for disapproval specifically denied to it by Congress.[15]

Accordingly, I cannot agree that authority inheres in section 43 "coupled with" section 15 to prescribe a plethora of agreement provisions as a pre-condition to approval, or that section 43 has always been available to "implement" section 15 in that manner at the option of the Commission. The Commission may not lawfully proceed under section 43 to prescribe rules which expand its authority under section 15. To hold otherwise is to render Congress unnecessary after passage of the original Act. Where, as here, the rules expand Commission authority into areas specifically prohibited by Congress, the action of promulgating them must be viewed as, at best, arbitrary and capricious.

III. Waiver

The Commission points to rule 528.3(b)(3), providing for exemptions from the requirement for an independent self-policing body under certain circumstances,[16]

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[15] That the Commission faces difficulties in attempting to enforce the Shipping Act, as evidenced by the horror stories of unlawful conduct recited in the majority opinion, is lamentable. The solution to those difficulties may lie with the Congress. It does not lie here. Nor can unlawful actions of the regulated authorize unlawful actions of the regulator.

[16] 46 C.F.R. § 528.3(b)(3) (1978) reads as follows:

> Upon petition to the Commission, an exemption may be sought to allow officers or employees of a rate-fixing body to act as the head of, or be assigned to duties under, the policing authority, if such person or persons are not otherwise employed by, affiliated with, or have any interest in, any member or any associate of a member. Petitions for exemption will not be lightly granted and must include a convincing showing that:
>
> (i) the persons conducting self-policing activities are qualified and their self-policing activities would

and trumpets that rule as evidence of its reasonableness in providing a solution to the many problems cited by petitioners as likely to cause the demise of the entire conference scheme. However that may be, a provision for possible waiver of unauthorized rules can hardly be said to create the missing congressional authority for those rules. If, as I believe, the Commission lacked authority to promulgate the challenged rules, its provision for waiver is simply irrelevant.

IV. Precedent

Former general order 7, predecessor to the challenged rules, was at issue in *Outward Continental North Pacific Freight Conference* v. *Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967). Promulgated pursuant to section 43, general order 7 provided that: (1) each conference agreement must include a provision describing the policing system used by Conference members, and (2) the conference must file with the Commission semi-annual reports describing the nature and disposition of all complaints received. Holding that the Commission had

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not substantially conflict with their other duties and responsibilities;

(ii) the agreement is so limited in scope that the retention of an independent self-policing authority would impose an unrealistic financial burden on the members. The number of members, the financial condition of the members, the nature and extent of the trade, the competitive circumstances prevailing in the trade, and other activities of the members both within and without the trade (*e.g.*, participation in other agreements) are all relevant considerations;

(iii) the trade covered by the agreement has been relatively free of rebating or other conduct violative of the Shipping Act in the five years preceding the year when exemption is sought and is likely to continue to be characterized by a minimal level of such malpractices.

not exceeded its rulemaking authority under § 43, this court said:

> [W]e think it a reasonable interpretation of the Congressional insistence upon adequate policing that the conference be able to point to some systematic and regular procedures for securing its members' adherence to the obligations of the agreement. Nor do we think the Commission exceeds its bounds in requiring that these procedures be described in a provision of the agreement. Compulsory amendment of the agreement is a reasonable manner of ensuring that the conference has in fact adopted a policing system and that it is brought clearly to the Commission's attention.[17]

The court further concluded that "[t]he Commission can reasonably 'find,' without the necessity of an extended substantially from general order 7. It is one thing to to adopt and communicate to the Commission an outline of its policing method does not adequately police its members." [18]

Whatever may be said of the authority found present in *Outward Continental*, the rules here challenged differ substantially from General Order 7. It is one thing to require at the threshold that conferences describe some policing system. It is quite another to prescribe all the effective provisions which must be included before agreements can be approved. *See Outward Continental*, 385 F.2d at 984 n.7. An agreement containing no description of a self-policing system might be said to raise at least

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[17] *Outward Continental N. Pac. Freight Conference v. Federal Maritime Comm'n*, 385 F.2d at 984 (footnote omitted).

[18] *Id.* at 984-85 (footnotes omtited). Whatever may have been meant by "an extended evidentiary hearing," I read this statement as affirming the adjudicatory role of the Commission under section 15.

an inference that a conference is employing none. The same inference is not raised, however, by an agreement that does describe a policing system, albeit a system differing in some respect from that designed by the Commission and specified in the challenged rules. Approval of the rules here challenged would in my view rest on an unwarranted extension of what was said and done in *Outward Continental.*

V. Conclusion

I would set aside 46 C.F.R. § 528 (1978) as an invalid and unlawful exercise of the Commission's authority.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2172

September Term, 1980

Trans-Pacific Freight Conference of Japan/Korea, et al.,

Petitioners

v.

Federal Maritime Commission and United States of America,

Respondents

Latin America/Pacific Coast Steamship Conference, et al.,

Intervenors.

No. 79-1062

Sea-Land Service, Inc.,

Petitioner,

v.

Federal Maritime Commission and United States of America,

Respondents.

Gulf European Freight Association, et al.,

Intervenors.

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Mikva and Edwards

ORDER

The suggestions for rehearing *en banc* filed by petitioners Trans-Pacific Freight Conference of Japan/Korea, et al. and petitioner Sea-Land Service, Inc. having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Circuit Judge Wald did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2172

September Term, 1979

Trans-Pacific Freight Conference of Japan/Korea, et al., Petitioners,

v.

Federal Maritime Commission and United States of America, Respondents,

Latin America/Pacific Coast Steamship Conference, et al., Australia/Eastern U.S.A. Shipping Conference et al., Gulf-Mediterranean Ports Conference, Gulf European Freight Assoc., Continental-US Gulf Freight, United Kingdom/USA, Intervenors.

No. 79-1062

Sea-Land Service, Inc., Petitioner,

v.

Federal Maritime Commission and United States of America, Respondents,

Gulf European Freight Association, et al., United Kingdom/USA Intervenors.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL MARITIME COMMISSION

Before: ROBINSON and WILKEY, Circuit Judges and MARKEY*, Chief Judge, United States Court of Customs and Patent Appeals.

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*Sitting by designation pursuant to 28 U.S.C. §293(a).

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Federal Maritime Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the orders of the Federal Maritime Commission under review are affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

Date: September 11, 1980
Opinion for the Court filed by Circuit Judge Wilkey
Dissenting opinion filed by Chief Judge Markey

APPENDIX C

FEDERAL MARITIME COMMISSION

(46 CFR PART 528)

ADDITIONAL PROVISIONS AND REPORTING REQUIREMENTS APPLICABLE TO SELF-POLICING SYSTEMS UNDER GENERAL ORDER 7

(DOCKET NO. 73-64)

NOTICE OF PROPOSED RULE-MAKING

By *Federal Register* notice of February 23, 1973 (38 F.R. 4982-4993) the Commission announced a proposed rulemaking under Docket No. 73-5 to establish a new Part 544 to Title 46 CFR for the purpose of incorporating all of its rules and guidelines pertaining to Section 15 agreements into one comprehensive rule and to make such changes and additions as appeared necessary to cover all aspect of the filing and modification requirements of Section 15 agreements.

On June 14, 1973, the Commission suspended the procedure schedule in Docket No. 73-5, pending further notice, in order to permit a reevaluation of the proposed rules.

As a result of such reevaluation, the Commission has decided to modify its proposed rules to remove or to mitigate requirements and provisions which it now deems may be objectionable or burdensome and to add or to augment other provisions and requirements which it now believes to be necessary to strengthen or to clarify certain provisions.

Included among the rules in Docket No. 73-5 is General Order 7, Self-Policing Systems, 46 CFR Part 528.

Because the proposed changes to these rules are especially important and are expected to generate considerable interest, we have decided to sever them from the proposed rulemaking in Docket No. 73-5 and to establish a separate rulemaking proceeding with respect thereto in order not to delay action on the other rules. Consequently, self-policing rules will remain under General Order 7 and Part 528 of 46 CFR.

In Docket No. 73-5 we proposed to change the self-policing rules in the following respects:

1. To require that every self-policing system provide for an individual or body who is directed to constantly police the activities of the members through inspection of books and records, surprise audits and investigations of rumors of malpractices.
2. To require that a copy of all records of self-policing activities be maintained in the United States regardless of location of the headquarters of the conference or rate agreement.
3. To require that the identity of the party found to have committed a violation be disclosed after final disposition of the self-policing proceeding.

The Commission now considers that the requirement to maintain a neutral person or body to perform the policing function could impose an undue economic burden on conferences or rate agreements with limited resources or where the need for a sophisticated self-policing system is questionable. Accordingly, we are permitting an exception to the neutral body requirement where it can be demonstrated that it is not absolutely necessary and would create an undue hardship.

The requirement that a copy of all self-policing records must be maintained in the United States could

create serious problems on the grounds that many countries have laws prohibiting disclosure outside the country and it might create an economic burden on the parties to ratemaking agreements to maintain duplicate sets of records. The laws of other countries notwithstanding, the Commission has a duty to keep itself informed as to the efficacy of self-policing by the conferences and rate agreements under its jurisdiction. To do this it must have access to records and other documents evidencing the manner in which self-policing is being conducted. However, to relieve conferences and rate agreements of the burden of maintaining duplicate records, we are modifying our requirement in this respect to provide that copies of records of self-policing activities will be made available to the Commission or any other appropriate governmental authority upon request. Also, we are allowing the names of the parties involved in any self-policing activity to be deleted from such records.

In reconsidering the requirement that the identity of the party in violation be disclosed upon completion of the self-policing proceeding, the Commission takes note of the apparent fear of the steamship lines that they would be placing themselves in double jeopardy, first to the policing body and then to the Commission. However, our intent in this respect is not to have the opportunity to inject ourselves into the policing activity but to be able to see how energetically policing is being administered and how effective it is in deterring repeated offenses. Therefore, to dispel any fear of double jeopardy, in lieu of disclosing the actual identity of the party in violation, we are proposing that each member of a conference or rate agreement be assigned a coded identity for reporting purposes.

Upon re-examination of our original proposed rules, we find that the requirement that a separate neutral person or body be appointed to perform self-policing functions is not clearly stated. Therefore, to avoid any misinterpretation, we are adding language to make this perfectly clear.

In addition, we are making other language additions and changes in recognition of the fact that policing will no longer be conducted exclusively on the basis of complaints but will also consist of self-generated investigations by the policing body.

Also, with respect to a proven violation, we are requiring that the offense be specifically described in lieu of stating the nature thereof. We do this on the basis of present comparative experience between the few reports we now receive which define the offense exactly and the majority which only identify it within a generic category. We find the specific description to be much more useful in evaluating self-policing and in recognizing possible problem areas in a particular trade.

As we stated in Docket 73-5, existing self-policing systems have generally failed to achieve their purpose. This is demonstrated by the fact that malpractices have been extant in many of our foreign trades and yet little or no policing action has ever been reported.

The primary cause for this failure is, in our opinion, the fact that practically all self-policing systems rely solely on the filing of complaints for the investigation and discovery of malpractices and have no procedure for the continuing surveillance of their member lines' activities. Admittedly, General Order 7, by the manner in which it is couched, encourages this type of system. However, the legislative history to Public Law 87-346 (75

Stat. 764) clearly shows that Congress intended for the carriers and other persons subject to the Shipping Act, 1916, to vigorously and actively police their concerted activities carried out pursuant to the Commission's approval.

Another reason for this failure, we feel, is that in most instances self-policing is essentially the responsibility of the conference chairman or secretary who, because of a multitude of other duties and a limited staff, does not have the time nor the facilities to conduct an effective, full-time policing program.

For these reasons and in these respects the Commission considers it necessary to modify its self-policing rules to require more active and more effective self-policing and to increase its surveillance over such activity to insure that this is achieved.

Therefore, pursuant to Section 4 of the Administrative Procedure Act (5 U.S.C. 553) and Sections 15, 21, and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820 and 841A), notice is hereby given that the Commission proposed to revise Part 528 of Title 46 CFR. As proposed to be revised, Part 528 would read as follows:

Part 528—SELF-POLICING SYSTEMS

Sec.

528.1 Scope and purpose.

528.2 General requirements; section 15 agreements.

528.3 Self-policing provisions; specific requirements.

528.4 Reporting requirements.

528.5 Filing of amendments to approved agreements.

528.6 Two party rate-fixing agreements.

AUTHORITY: The provisions of this Part 528 issued under secs. 15, 21, and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820, and 841(a)).

§528.1 Scope and purpose.

Section 15 of the Shipping Act, 1916, as amended by Public Law 87-346 (75 Stat. 763-4) provides that the Commission shall disapprove an agreement thereunder if, after notice and hearing, it finds inadequate policing of the obligations of the agreement. This amendment makes it necessary that provision for self-policing be included in certain section 15 agreements and that the Commission be informed of the manner in which such provision is being carried out. The requirements set forth below are to aid the Commission in determining the existence and adequacy of self-policing systems in accordance with the statutory objective.

§528.2 General requirements; section 15 agreements.

Conference agreements and other rate-fixing agreements between common carriers by water in the foreign and domestic offshore commerce of the United States or other persons subject to the Shipping Act, 1916, whether or not previously approved, shall contain agreement provisions describing the method or system used by the parties in policing the obligations under the agreement, including the procedure for handling complaints and the function and authority of every person having responsibility for administering the system.

Every self-policing system must provide for a separate individual or body,[1] not affiliated with any member line,

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[1]Subject to Commission approval and demonstration that the maintenance of a separate individual or body would place an undue burden on the conference or rate agreement, the chairman or

[footnote continued]

that is directed to constantly police the activities of the members through inspection of books and records, surprise audits, inspection of billings, classifications, bills of lading and other documents, investigations of rumors or complaints of malpractices and through use of any other method of surveillance that would tend to affirmatively disclose whether members are adhering to the letter and spirit of the agreement and the tariffs of the members. Inherent in such a requirement is the necessity for unqualified agreement by the members to make all such information, wherever located, available to the individual or body selected to perform such policing upon demand, with or without notice.

Every self-policing system must provide that, upon request, a copy of all records of self-policing activities will be made available to the Commission or any other appropriate governmental body. Such copy may delete the names of all parties involved.

§528.3 Self-policing provisions; specific requirements.

Every self-policing system required under §528.2 shall, as a minimum, contain specific provisions as follows:

(a) Offenses (general). A statement that any malpractice or breach of any provision(s) of the agreement, the tariff, or the rules and regulations thereunder, will be subject to self-policing sanctions;

(b) Permissible penalties (liquidated damages). A statement specifying the maximum penalties (liquidated damages) or range of penalties (liquidated damages) or

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secretary may be designated to perform the self-policing functions provided such person is qualified, has adequate staff and facilities to properly carry out his self-policing duties and has no affiliation with any member line.

the method by which such penalties (liquidated damages) shall be calculated which may be assessed against a member upon finding that such member has committed an offense. The statement may specify penalties (liquidated damages) for specific offenses and/or a general category of offenses and may relate to each and every offense, or to the number of times the member has previously been found guilty of an offense;

(c) Impartial adjudication. A statement designating or which describes the manner of designating a totally disinterested person or body unaffiliated with the conference or ratemaking agreement or any member thereof or a statement providing for the selection, on an ad hoc basis, of a panel of arbitrators in accordance with the traditional rules of commercial arbitration and vesting such person, body, or panel with the final authority to adjudicate disputes and assess penalties (liquidated damages) within the scope of the self-policing system. Such person, body, or panel shall not perform any duties under the self-policing system including investigation and/or prosecution. Depending upon the type of self-policing system used by the conference, this person, body, or panel may be the tribunal before which self-policing disputes are adjudicated solely and finally or may be designated as an appellate tribunal limited to the function of reviewing an initial determination of guilt and/or assessment of penalties (liquidated damages) made by the conference itself or by any other body designated by it to so act. In the latter event, the person, body, or panel shall independently review the record of the initial proceeding upon demand of the accused, the conference or the complainant and shall have full authority to affirm modify, or set aside any finding of fact, conclusion of law, or level of penalties (liquidated damages) assessed

and shall not be bound by the results of any prior determination; and

(d) Procedural guarantees to accused member. A statement incorporating the following elements of fundamental procedural fairness to an accused member:

(1) A member accused of an offense, malpractice, or breach shall be charged in writing a reasonable time prior to the initial hearing and such charges shall fairly apprise the accused member of the nature of the charges so as to permit it to frame an adequate defense: Provided, That such charges need not reveal the identity of the complainant;

(2) The accused member shall be furnished with all evidence a reasonable time prior to the initial hearing: Provided, That evidence developed thereafter shall also be furnished to the accused and a delay granted, if necessary, to allow the accused to frame an adequate defense and provided that evidence which would reveal the identity of the complainant may be deleted or summarized;

(3) The person, body, or panel required under paragraph (c) of this section shall be furnished only such evidence as is furnished to the accused under subparagraph (2) of this paragraph and such evidence as the accused may wish to furnish;

(4) The accused member shall be given a full and fair opportunity to rebut or explain any evidence or material and to present evidence of mitigating or extenuating circumstances; and

(5) The person, body, or panel required under paragraph (c) of this section may consider only such evidence and material properly furnished to it pursuant

to this section in reaching its decision and assessing penalties (liquidated damages).

§528.4 Reporting requirements.

Twice each year, once during the month of January and once during the month of July, there shall be filed with the Commission by the conferences and carriers subject to these rules, or by any person to whom they have delegated the self-policing authority, a report showing the nature and basis (complaint, routine surveillance, etc.) of each investigation initiated or docketed during the preceding 6-month period; a coded identification of the party[2] under investigation; the status or findings with respect to each investigation; and with respect to violations found, a specific description of the offense and the exact amount of the penalty (liquidated damages) or other sanction imposed.

For the purpose of this section any matter investigated or any initial complaint received by the conferences and carrier members or by any person to whom they have delegated the self-policing authority, shall be reported on the semiannual report to the Commission. Such report must be made even though subsequent investigation during the reporting period may establish that no violation has occurred. In the event that no matters are investigated nor any initial complaints received during the 6-month period, or no actions were taken on matters reported in the previous 6-month period, a negative report so stating shall be filed.

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[2]Members of an agreement must be assigned an identification code which shall remain constant for the duration of their participation therein.

§528.5 Filing of amendments to approved agreements.

All agreements previously approved under section 15 shall, if necessary, be amended to conform to the requirements of this part. Such amendments shall be filed with the Commission within sixty (60) days from the date of publication of these rules in the FEDERAL REGISTER.

§528.6 Two party rate-fixing agreements.

Any group with rate-fixing authority under an approved agreement which has no more than two signatory parties to the agreement shall be excepted from all requirements of this part.

Interested persons may participate in this rulemaking proceeding by filing with the Secretary, Federal Maritime Commission, Washington, D.C., 20573, on or before December 3, 1973, an original and 15 copies of their views or arguments pertaining to the proposed amended rules. All suggestions for changes in the text as set out above should be accompanied by drafts of the language deemed necessary to accomplish the desired change and by statement and arguments in support thereof.

The Federal Maritime Commission, Bureau of Hearing Counsel, shall participate in the proceeding and shall file Reply to Comments on or before December 28, 1973, serving an original and 15 copies on the Federal Maritime Commission and one copy to each party who filed written comments. Answers to Hearing Counsel's replies shall be submitted to the Federal Maritime Commission on or before January 8, 1974.

By the Commission

(SEAL) Secretary

APPENDIX D

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[General Order 7; Docket No. 73-64]

PART 507—SELF-POLICING SYSTEMS

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This rule amends the self-policing rules of the Commission by requiring that self-policing of Commission approved carrier agreements be done by persons not otherwise employed by or having any financial interest in a party to such agreement, and that self-policing include self-initiated investigations. This rule also amends the reporting requirements to include a more precise description of the self-policing activities. The purpose and effect of these regulations is to provide for better self-policing

DATES: To become effective July 1, 1978.

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SUPPLEMENTAL INFORMATION:

This rulemaking was initiated pursuant to section 43 of the Shipping Act, 1916, 46 U.S.C. 841) to enunciate and define the standards by which the Commission determines whether a particular ratemaking agreement is not adequately self-policed and therefore must be disapproved under section 15 of the Shipping Act, 1916. Furthermore, this rulemaking was intended to change the reporting requirements of self-policing activities in order to improve the ability of the Commission to determine whether a particular agreement is being effectively policed.

In response to the proposed rules many comments were received which were replied to by Hearing Counsel. Hearing Counsel's replies were answered by many of the original commentators. All of these comments have been considered by the Commission in promulgating the final rules. However, before the amended rules and the acceptance or rejection of the proposals of the commentators are explained, we think it is necessary to examine the rationale underlying "self-policing" as required by section 15 of the Shipping Act, 1916.

Section 1 of the Sherman Antitrust Act declares every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce to be illegal.[1] In interpreting that section, the Supreme Court has stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. . . ."[2]

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[1] 15 U.S.C. 1.

[2] *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

Among the practices deemed to be unlawful in and of themselves are price fixing,[3] division of markets,[4] group boycotts,[5] and tying arrangements.[6]

Nevertheless, Congress has determined, first in 1916 and then again in 1961, that the transnational and nationalistic promotional setting in which the ocean liner industry operates is so commercially unique that there may be redeeming factors which make agreements fixing prices, dividing markets, or creating tying arrangements not only reasonable but desirable. Therefore, if the parties to an agreement which would otherwise be illegal *per se* can show that such agreement is required to fill a serious transportation need, necessary to secure important public benefits, or is in furtherance of a valid regulatory purpose of the Shipping Act, 1916, then it may be approved and receive immunity from the penalties of the Sherman Antitrust Act.[7]

However, when the Bonner Act amendments to the Shipping Act were passed in 1961, a requirement of effective self-policing was incorporated into section 15 as *quid pro quo* for antitrust immunity.[8] Thus, the duty to

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[3] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

[4] *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898).

[5] *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457, 464 (1941).

[6] *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

[7] *F.M.C. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

[8] Report on the Ocean Freight Industry, Antitrust Subcommitte, Committee on the Judiciary, H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1972).

adequately self-police stems not from a finding by the Federal Maritime Commission of a need for policing, but rather *is an obligation imposed by law.* Furthermore, self-policing is an obligation which cannot be fulfilled *pro forma* but is one which requires *effective* positive conduct on the part of the conferences in return for continued recognition of the conference system.

Section 15 of the Shipping Act, 1916, requires the Federal Maritime Commission to determine which self-policing systems are effective and which are not and to disapprove those agreements which are inadequately policed. Hence, we have undertaken this rulemaking to prospectively determine and enunciate some of the standards by which self-policing systems will be judged to be adequate or inadequate.

Such a prospective determination and enunciation of some of the standards to be used in the future is not to be confused with adjudication as to whether those standards have been met in a particular case.[9] Although many parties contest the authority of the Commission to set such standards by rulemaking,[10] it is well settled that the Commission may make use of its rulemaking authority under section 43 of the Shipping Act, 1916, to define and articulate enforceable standards[11] to be used to judge

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[9] *Pacific Coast European Conference v. United States,* 350 F.2d 197 (9th Cir. 1965).

[10] "This contention [that the Commission may proceed only on a case by case basis] has the antique virtues of simplicity and straightforwardness. The difficulty is that it is a doctrinal archaism in modern administrative law. It comes, indeed, at a time when many knowledgeable voices have been urging the agencies to make greater, rather than less, use of their rule-making authority in the interest of more precise definition of decisional standards." *Pacific European Conference v. F.M.C.,* 376 F.2d 785 (D.C. Cir. 1967).

[11] *Id.* at 788, 789; *Pacific Coast European Conference v. F.M.C.,* 439 F.2d 514, (D.C. Cir. 1970); *Cf. H. Friendly, The Federal*

[footnote continued]

the adequacy or inadequacy of self-policing.[12] In fact, a rulemaking proceeding appears to be both superior and preferable to case by case adjudication for the purpose of defining and articulating the standards a regulatory agency must enforce.[13] The proposed standards have been set forth as minimum requirements for inclusion in section 15 agreements. Any agreement which does not contain these required provisions will be presumed to not meet these standards of adequate policing and therefore may be found to be inadequately policed.[14]

Set forth below is a discussion of the self-policing rules themselves and an explanation of the changes which have and have not been made.[15]

Section 528.1 *Scope and Purpose.*

There have been no substantive changes in section 528.1 from that proposed.

Administrative Agencies, the Need for Better Definition of Standards, (1967).

[12]*Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981 (D.C. Cir. 1967).

[13]*CIBA-Geigy Corp. v. Richardson*, 446 F.2d 466 (2d Cir. 1971).

[14]"The Commission can reasonably 'find', without the necessity of an extended evidentiary hearing, that any conference which refuses to adopt and communicate to the Commission an outline of its policing methods does not adequately police its members." *Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981, 984, 984 (D.C. Cir. 1967).

[15]We are denying the request made by one commentator that the Commission stay these rules pending adoption of the UNCTAD Code of Conduct for Liner Conferences Convention. Not only does the UNCTAD code fail to address many of the issues treated by these rules, but the United States is not presently a signatory to the convention.

Section 528.2 *General Requirements; section 15 Agreements.*

The primary change proposed in this section was that self-policing would have to be carried out by neutral persons or bodies. This proposal recognized that policing by a conference chairman or secretary is necessarily ineffective because the demands of other duties and responsibilities do not leave enough time, nor are they able to devote sufficient attention, for the effective discharge of the self-policing functions. While the final rules promulgated herein retain the neutrality requirement generally, an exemption is provided in new section 528.4 where it can be demonstrated that the duties of the conference personnel entrusted with the self-policing functions, are minimal, the Agreement is limited, the parties to the agreement are small and the trade relatively free of malpractices.

We find, however, that it is desirable that the self-policing body be otherwise independent of the members to the agreement. No member or employee of the policing authority may be retained or employed by or financially interested in any party to the agreement. Since the policing authority will have access to the confidential business records of the members to the agreement, it is absolutely essential that the policing authority not have any connection with or financial interest in any of the members to the agreement. However, if the policing authority is an independent certified public accountant with no connection with a member line other than as an independent contractor, there is little likelihood of compromise of such confidential business records of chance that any bias will enter into the implementation of the functions of the policing authority. As the Commission has noted:

> In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non neutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, *i.e.*, independent contractor for professional or business services, with a conference member line other than the accused.[16]

However, even an independent certified public accountant would be put into an untenable conflict of interest situation in cases where a firm would be called upon to investigate a client. In such situations the independent certified public accountant should not make the investigation and another independent certified public accountant without such connections with the investigated party should take its place.

Contrary to the assertions of some commentators, this neutrality requirement does not dictate employment practices or require one particular method or procedure

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[16]Final Report quoting Initial Decision, *Agreement 150-21*, 9 F.M.C. 355, 367 (1966).

of self-policing. We believe that this requirement is sufficiently flexible to accommodate any adequate self-policing system which a conference wishes to employ.

Another proposed amendment to section 528.2 was to broaden the scope of the self-policing rules to apply to all rate-fixing agreements between persons subject to the Shipping Act, 1916. However, the rules were primarily intended to apply to carriers by water and this proceeding has demonstrated that the application of the self-policing rules to terminal rate agreements and other parties involve factors which should be considered separately. The application of these rules will therefore be confined to conference and other rate-fixing agreements between common carriers by water.

The rules have also been amended to more clearly state the requirements in the proposed rules that: (1) a policing authority must be established, (2) the functions and authority of the policing authority must be stated, and (3) the method or systems used to police the obligations under the agreement must be described. These changes were prompted by comments to the effect that the existing rules requiring a description of "the function and authority of every person having responsibility for administering the system" seem to require that the officer administering the self-policing system be personally named in the conference agreement. That was not the intent of the rule. The intent of the rule was, and is, to require that someone be invested with the power to investigate, adjudicate, and penalize any deviation from the rate-fixing agreement. The members to an agreement may accomplish these tasks by establishing one or more self-policing entities, as they wish. Nevertheless, the functions and authority of each of those entities must be described so that we can ascertain how the policing

functions are apportioned and, more importantly, that all required self-policing functions are actually delegated and carried out. The names of the person or persons heading the policing authority and description of their staff, facilities, and budget must be made available to the Commission only on request.

With regard to self-policing procedures, investigations of malpractices or other violations of the agreement which come to the attention of the policing authority in any manner must be undertaken.

Section 528.2, as proposed, also requires self-initiated investigations. We think it is obvious that in order for a self-policing system to be effective, the policing authority must make investigations *sua sponte*.[17] While we are not prepared to establish all the kinds of investigations which must be carried out and set a minimum frequency for each type of self-initiated investigation, it is imperative that each conference does establish, for itself, a program of self-initiated investigations such as surprise audits of books, and examination of records, billings, classifications, bills of lading and other documents. Further, investigations, whether pursuant to a complaint or *sua sponte*, cannot be effective unless the policing authority is authorized to examine or inspect any books, records, billings, classifications, bills of lading, or other documents, cargo and containers, ships, property and facilities. The agreement must, therefore, provide for such authorizations.

A question has been raised regarding the constitutionality of requiring members to submit to surprise audits and other investigations. It was alleged that this provision

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[17]Report on Ocean Freight Industry, *surpa*, n. 10, at 314.

would violate the constitutional guarantee against unreasonable searches and seizures. Since there is no search or seizure by the Government and no criminal action is contemplated, we do not believe there is a constitutional impediment involved.

The effect of the laws of other nations upon the access of the policing authority to member records has also been brought into question. However, no law of another nation was cited, nor do we know of one, which would preclude a member from giving its records to one of its own agents. The policing authority's access to member records is essential for effective self-policing and is not a requirement that can be waived.

Section 528.3 *Self-policing provisions; specific requirements.*

There were no proposed amendments to section 528.3. However, comments were received questioning the use of the phrase "liquidated damages" in this section. As we have already discussed, the concept of self-policing is based upon the ability of the conference to collect damages for breach of contract. The amount of damages for each breach may be calculated upon the amount of the actual damages shown for each particular occurrence or may be calculated in advance (liquidated damages) for each type of breach so that the actual damages do not need to be proven each and every time that type of breach occurs. Because these rules require an advance statement of the amount of damage for each type of breach, the use of the term "liquidated damage" is accurate. Nevertheless, the damages are calculated in the context of "policing" and, therefore, the Commission recognizes the use of terms such as violation, fine, settlement, offense or punishment, by the industry in

place of the term "liquidated damages". The Commission has indicated in previous proceedings that the concept, not the terminology, is of importance.

We have also considered the assertion that a distinction should be made in this section between malpractices (defined by a commentator as deliberate acts intended to secure unfair competitive advantage) and misratings (defined by a commentator as inadvertent clerical error), and that only malpractices should be made subject to self-policing sanctions. Although we do not object to a conference establishing separate investigative bodies for different classes of breaches of their agreement, as long as they comply with the self-policing rules, we do not agree that so-called "misratings" should not be subject to self-policing sanctions. Misratings can be an effective and disguised method of rebating and should therefore be one of the prime concerns of an effective self-policing program. The introduction of an exception for misratings could offer an opportunity for abuse and virtually emasculate the self policing rules.

We are also not in agreement with the contention that the right of appeal to neutral arbitrators should be rescinded. Impartial adjudication by persons not connected with the investigation or prosecution is a feature which both the Commission and the courts[18] have found to be an important and necessary.

One commentator also objected to the provisions of paragraph (c) of this section requiring appeals by the complainant or conference and review *de novo*. The

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[18]*States Marine Lines, Inc. v. Federal Maritime Commission*, F.2d 230 (D.C. Cir. 1967); In re *Modification of the Self-policing Provisions of Agreement No. 1509, 3103*, 11 F.M.C. 434 (1968).

commentator misread the rule, in one respect, in that a *de novo* review is required, not a *de novo* trial. The right of appeal argument of this commentator is not persuasive. The reasons for requiring appeal to be given to the complainant and the conferences were set forth by the Commission in a previous rulemaking. 35 F.R. 16679, Oct. 28, 1980. That rationale continues to be valid.

A proposed addition to section 528.4 was that the reporting of the self-policing activities be done by a coded number for each violator. Numerous commentators objected on the grounds that the code could easily be broken, thus destroying the confidentiality necessary for effective policing and subjecting the parties to the perils of "double jeopardy".

We find these comments to be devoid of merit. There is no "double jeopardy" when a person becomes subject to penalties for violating both his contractual obligations and the criminal statutes of the United States. The question of the efficacy of reporting violations by a coding system does not revolve around the false issue of "double jeopardy" but rather depends upon how the powers of the Commission to surveil the self-policing activities, through the medium of required periodic reporting, can best be used to encourage effective self-policing and uncover ineffective self-policing.

However, there appears to be a concern about how the Commission's enforcement activities affect self-policing activities. It is asserted that it is unreasonable to expect carriers to willingly establish and finance an effective self-policing system if the self-policing records are routinely used to prosecute the members for statutory violations.

While we recognize that it is important to use the enforcement powers of the Commission in such a manner

as to promote and not to discourage effective self-policing, we also have a duty to enforce the provisions of the Shipping Act, 1916. Further, the requirement to self-police contained in section 15 of the Shipping Act was not intended to limit the Commission in carrying out its enforcement function. We, therefore, will make every effort to encourage and cooperate with the self-policing authorities, and at the same time will remain committed to the use of enforcement powers to whatever degree necessary to free our waterborne commerce of Shipping Act violations.

The reporting of agreement violations gives the Commission some evidence of how effectively the self-policing activities are being administered. Therefore, the periodic reports must state how many violators are caught. Another indication of the effectiveness of self-policing is the frequency of recidivism. We are therefore requiring the report to state the number and general description of other violations by the carrier involved (without identifying it or listing it by number), in the five years preceding the date of the finding of the violation. We believe this information, along with the specific and detailed description of the offense and the exact amount of the penalty (liquidated damages), will enable the Commission's staff to ascertain how effectively the self-policing obligations are being carried out.

Questions have also been raised as to how specific a "specific" description needs to be. Clearly something more than a mere category is required. Statements such as "violation of conference agreement," "rebate" or "misrating" are insufficient. A partial recital of the facts of each case is necessary so that the Commission may ascertain whether specific complaints are effectively and

efficiently investigated.[20] The Commission staff occasionally refers the facts of an alleged breach of an agreement to the conference policing authority for disposition. Usually these occurrences have taken place in a foreign country where the conference can more easily make a complete investigation than can the Commission. Thus a recital of the essential facts of each completed investigation in the semi-annual report will allow the staff to ascertain how the referred complaint has been handled without the necessity of securing separate follow-up reports from the conference. Special reports may be solicited when conference action on a referred complaint is neither forthcoming nor apparent from the semi-annual reports. Such reporting will also enable the staff to assess the effectiveness of conference investigations of alleged breaches of which the Commission has independently become aware.

The specific description of the offense also allows the staff to evaluate the level of the penalty (liquidated damages) in terms of how effectively self-policing sanctions are being used to deter breaches and how vigorously recidivistic behavior is discouraged. The Commission does not believe that a statement of the exact amount of the penalty (liquidated damages) is in any way adverse to the administration of an effective self-policing program. Quite to the contrary, we believe that more detailed and specific reporting requirements introduce an element of accountability which has been lacking to date and should

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[20]If a particular occurrence involved a rebate, for example, the report must state how the rebate was made and the amount of the rebate: *e.g.*, cash rebate, $2,500; or indirect rebate of $1,500, shipment described as 10 measurement tons of X at $50 a ton, actually 10 measurement tons of Y which has tariff rate of $65 a ton.

prove to be an incentive for more effective policing. The fact that some carriers do not want to know the amount of the fine levied by their self-policing authorities against other lines does not necessarily indicate to us that their primary concern is with better enforcement and certainly is not persuasive that this provision is in any way contrary to the intent of these rules.

Furthermore, the comparison of penalties (liquidated damages) according to the circumstances of each case, will not lead to controversy between lines unless the penalties are so arbitrary that they should be exposed anyway. The concern is unfounded that the Commission staff cannot appreciate the circumstances which the conference may take into account for mitigating penalties (liquidated damages), unless, of course, those circumstances are purposefully left out of the semi-annual policing reports.

The necessity of the negative reporting requirement of this section has also been questioned. However, the negative reporting requirement serves a useful purpose in informing the Commission that the conference, or parties to a rate making agreement, have no policing activities to report, as opposed to merely being delinquent in filing their reports. Because self-policing programs must have self-initiated investigations as well as investigations of complaints in order to be effective, it is quite important to distinguish between inactivity and delinquent reporting.

Section 528.5 *Filing of amendments to approved agreements.*

This section has been changed to require the filing of amendments to existing agreements to conform with this rule to be filed on or before July 1, 1978.

In preparing these rules for publication, we have become aware of some further problems and inadequacies in the proposed rules. For example, it is clear that the proposed rules in sections 528.2 and 528.3 would require a functionally separate policing authority and impartial adjudicator. We have, therefore, incorporated such a statement into 528.2.

The rules have also been reorganized into a more logical and comprehensive format. For example, section 528.2 sets forth the general requirements for section 15 agreements. Furthermore, the minimum requirements for policing authorities and impartial adjudicators have been set forth in new sections of their own (sections 528.4 and 528.5, respectively).

The new section 528.3 governing the specific requirements of self-policing provisions is, for the most part, a restatement of the requirements under section 528.3 of the existing rules, which were not proposed to be changed. However, paragraph (c), which sets forth the requirements for investigation of violations, has been relocated.

The minimum requirements for policing authorities (section 528.4) have been extensively rewritten. The requirements of qualified personnel, adequate staff, facilities and budget have been made to explicitly apply to all policing authorities.

As indicated above, the general requirement in section 528.4 for the use of a neutral body allows for an exemption upon a showing that the officer's or employee's other duties will not unduly interfere with the policing duties, and the need for vigorous policing is not great because of the nature of the agreement, the scope of the trade, and the history of violations.

This section also allows independent certified public accountants under specified conditions, to act as the policing authority without violation of the neutrality requirements, even though such accountant has a client which is a member of the Agreement. The rule has also been amended to accommodate policing entities such as those set up by the Associated North Atlantic Freight Conferences.

PART 528—SELF-POLICING RULES

528.1 Scope and Purpose

528.2 General Requirements for Section 15 Agreements.

528.3 Self-policing Provisions; Specific Requirements.

528.4 Policing Authorities; Minimum Requirements.

528.5 Impartial Adjudicators; Minimum Requirements.

528.6 Reporting Requirements.

528.7 Filing of Amendments to Approved Agreements.

528.8 Two Party Rate-fixing Agreement Exemption.

AUTHORITY: The provisions of this Part are issued under sections 15, 21, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820, 833(a), and 841(a)).

528.1 Scope and Purpose.

Section 15 of the Shipping Act, 1916 provides that the Commission shall disapprove any agreement required to be filed under that section, after notice and hearing, on a finding of inadequate policing of the obligations under such agreement. The Act, thus contemplates that self-policing provisions shall be included in certain section 15 agreements and that the Commission shall be kept informed of the manner in which such self-policing provisions are being implemented. Furthermore, section 43 of the Shipping Act, 1916, requires the Commission

to make such rules and regulations as may be necessary to carry out the provisions of the Act. The requirements set forth in this Part are designed to aid the Commission in determining the existence and the adequacy of self-policing provisions, to inform the Commission as to the manner in which such self-policing provisions are implemented and to establish standards for determining when section 15 agreements are inadequately policed. The requirements of this Part notwithstanding, each conference or other rate-fixing agreement has the obligation to police itself and evidence of rebating or other malpractices shall be *prima facia* evidence of inadequate self-policing.

528.2 *General Requirements for Section 15 Agreements.*

Each conference agreement and other rate-fixing agreements between common carriers by water in the foreign or domestic offshore commerce of the United States, whether or not previously approved, shall contain provisions establishing and describing a self-policing system. The self-policing provisions shall describe the method or system, and the standards, used to investigate, prosecute and adjudicate breaches of the agreement by common carriers by water which are signatory to the particular agreement (hereinafter referred to as "members") and by persons, firms, associations or corporations that are agents of a member or have a corporate relation with a member (hereinafter referred to as "associates"). Such agreements shall also contain provisions establishing a policing authority and an impartial adjudicator which shall be functionally separate and distinct from such policing authority. The agreement shall describe the functions and authority of each of these two entities.

528.3 *Self-policing Provisions; Specific Requirements.*

Conference agreements and other rate-fixing agreements between common carriers by water in the foreign or domestic offshore commerce of the United States shall include the following in the self-policing provisions required under 528.2:

(a) *Breaches* (general). A statement that any malpractice, or violation or breach of any provision(s) of the agreement, the tariff, or the rules and regulations thereunder (referred to herein as a breach), by any members of the agreement or their associates will subject such members or associates to self-policing sanctions;

(b) *Permissable Damages.* A statement specifying the maximum damages, or range of damages, or the method of calculating the damages, which may be assessed against members of the agreement upon finding that such members or their associates have committed a breach. Such statement may specify damages for specific breaches and a general category of breaches or both, and may relate to each and every breach, or to the number of times the member or associate has previously been found guilty of a breach;

(c) *Investigations of breaches.* A procedure for investigating breaches of the agreement which are the subject of complaints, either written or oral, from a member, or any other person, or indications of which are brought to the attention of the self-policing authority in any other manner. Such procedure shall require the policing authority to investigate all the complaints which it receives and to make investigations *sua sponte* on a periodic basis, to make surprise audits, and to examine or inspect, upon demand, with or without notice and wherever located: any books, records, billings, classifications, bills of lading

or other documents, cargo, containers, ships, property and facilities owned, used, or transported by any members of the agreement. The procedure shall also require all officers, employees, agents or assigns of such members to cooperate with, and freely provide information to, the policing authority or its agents.

(d) *Adjudication of breaches.* A procedure for adjudicating contested claims of breaches which affords all members of the agreement and their associates the right to a hearing before an impartial adjudicator, who shall adjudicate such claims solely and finally, either as the initial adjudicator or, upon review *de novo* on the record of an initial determination made by the policing authority. For purposes of this paragraph, "review *de novo* on the record" requires the impartial adjudicator to have full authority to affirm, modify or set aside any finding of fact, conclusion of law, or level of damages made or imposed by the policing authority.

(e) *Procedural guarantees.* A statement incorporating the following elements of fundamental procedural fairness to be given to the member or the associate thereof, which is alleged to have committed a breach (referred to herein as the accused):

(1) The accused shall be charged in writing, within a reasonable time prior to the initial hearing, and such charges shall fairly apprise the accused of the nature of the charges, so as to permit it to frame an adequate defense: Provided, That such charges need not reveal the identity of the complainant;

(2) The accused shall be furnished with all evidence within a reasonable time prior to the initial hearing: Provided, That evidence developed thereafter, shall also be furnished to the accused and a delay granted, if

necessary, to allow it to frame an adequate defense, and provided that evidence which would reveal the identity of the complainant may be deleted or summarized;

(3) The adjudicator shall be furnished only such evidence as is furnished to the accused under subparagraph (2) of this paragraph, and such evidence as the accused may wish to furnish;

(4) The accused shall be given a full and fair opportunity to rebut or explain any evidence or material, and to present any evidence of mitigating or extenuating circumstances; and

(5) In reaching its decision and assessing damages, the adjudicator may consider only such evidence and material properly furnished to it pursuant to this section.

Section 528.4 *Policing Authorities; Minimum Requirements.*

(a) All policing authorities must have an adequate and qualified staff, adequate facilities, and an adequate budget. The names of the person or persons heading the policing authority or employed as the policing authority and a description of their staff, facilities and budget must be provided to the Commission, upon request.

(b) The policing authority must be headed by, and composed of, persons not otherwise employed by, having any financial interest in, or affiliated with, the conference or rate-fixing group established by the Agreement, or any member or associate. Provided, however, that:

(1) An individual or association entity will not be precluded from acting as the policing authority for more than one conference agreement or other rate-

fixing agreement, even if there are partially or fully overlapping memberships.

(2) An independent certified public accountant (referred to herein as an ICPA) may act as the policing authority, even though it has a client which is a member of the agreement or an associate of such member, where such relationship is disclosed prior to being named as the policing authority and it is disqualified from acting as the policing authority with respect to the member which is, or whose associate is, a client of the ICPA. If the ICPA named as the policing authority discloses that it has a member of the agreement or an associate of such member as a client, an alternate policing authority must be appointed to receive and investigate any complaints against such member or associate.

(3) Upon petition to the Commission, an exemption may be sought to allow officers or employees of the conference or rate-fixing group established under the agreement to act as the head of, or be assigned to duties under, the policing authority, if such person or persons are not otherwise employed by, affiliated with, or have any interest in, any member of the agreement or associate of such a member. All petitions for exemption must include a showing that (i) such person or persons are qualified, and would have minimal duties other than those in the policing authority, and (ii) the agreement has only a few members, applied to a narrow range of ports, the ocean liner cargo transported by the members pursuant to the agreement represents a small percentage of the total ocean liner cargo in that trade, and such trade has been relatively free of malpractices in the five years preceding the year when exemption is sought.

(c) The policing authority of each conference agreement or rate-fixing agreement must investigate all complaints, either written or oral, from any member of the agreement or associate of such a member or any other person, alleging a breach of the conference or rate-fixing agreement. The policing authority shall also conduct self-initiated investigations of all members of the agreement, such as inspection of books and records, surprise audits, and inspection of containers, cargo, billings, classifications, bills of lading, and other documents.

Section 528.5 *Impartial Adjudicators, Minimum Requirements.*

(a) An impartial adjudicator must be a totally disinterested person or body, unaffiliated with the conference or the rate-fixing group established under the Agreement, or any member or associate thereto, and may be appointed on a permanent basis or selected on an *ad hoc* basis from a panel of arbitrators in accordance with the traditional rules of commercial arbitration.

(b) The impartial adjudicator must be vested with final authority to adjudicate disputes and assess damages within the scope of the self-policing system.

(c) The impartial adjudicator shall not perform any other duties under the self-policing system with regard to any matter before it for adjudication, including investigation or prosecution, or both.

Section 528.6 *Reporting Requirements.*

(a) An officer or official to be responsible for the filing of the self-policing reports required by this section shall be designated by the conference or the rate-fixing group established under the Agreement. With respect to each such agreement, the designated officer or official shall file a report, on or prior to January 31 and July 31 of each

year covering the policing and adjudicatory activities during the six-month period immediately preceding the reporting month (July 1 - December 31; January 1 - June 30) with the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20473. The initial report shall be filed on or prior to January 31, 1979, and shall cover the period from July 1, 1978 thru December 31, 1978.* Such reports shall contain the following information:

(1) The number of cargo inspections performed in each port (naming such port) served by the members of the agreement.

(2) The number of misdescriptions, miscubings, misweighings and other discrepancies or breaches of the agreement detected by cargo inspections.

(3) The number and location of shipping document inspections.

(4) The number of misdescriptions, miscubings, misweighings and other discrepancies or breaches of the agreement detected by shipping document inspections.

(5) The number and locations of examinations of member line's office records. Describe the type of documents examined in each examination.

(6) The number of misdescriptions, miscubing, misweighings and other discrepancies or breaches of the agreement which were detected by the examination of office records.

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*Reports covering the period from January 1, 1978 through June 30, 1978 shall conform to the reporting requirements of section 528.4, in effect on June 30, 1978.

(7) The nature of each written or oral complaint or other indication of a breach of the agreement received during the reporting period.

(8) The number of investigations conducted as a result of intelligence gathering activities.

(9) The status or findings with respect to each investigation whether based on a complaint or self initiated, which has not been reported as final in any previous report. An action may not be reported as final unless:

(i) The investigation revealed insufficient evidence to establish a breach; or

(ii) the accused has paid damages whether based on a voluntary settlement, or based on a decision rendered by the policing authority or the impartial adjudicator.

(10) With respect to each matter involving a final action, the report shall contain:

(i) a specific detailed description of the breach and the amount of the damages paid following settlement or adjudication.

(ii) a list of all other breaches committed by the member or its associates during the five year period preceding the final action and the damages paid for each of those previous breaches.

(b) The report shall clearly indicate those matters handled by the policing authority and those matters handled by the impartial adjudicator. The report shall be certified by the reporting officer, the head of the policing authority and the impartial adjudicator(s), as to the accuracy and the completeness of the information contained therein.

(c) In the event there are no complaints, investigations or final actions to report, and there are no investigations which have not been reported as a final action, a report so stating shall be certified and filed with the Secretary.

Section 528.7 *Filing of Amendments to Approved Agreements.*

All conference agreements and other rate-fixing agreements, approved under section 15 of the Shipping Act, 1916, shall be amended as is necessary and appropriate to conform to the requirements of this Part. Such amendments shall be filed with the Commission no later than July 1, 1978.

Section 528.8 *Two Party Rate-fixing Agreements.*

Any group with rate-fixing authority under an approved agreement which has no more than two signatory parties to the agreement shall be exempt from all requirements of this Part. By the Commission.

Francis C. Hurney
Secretary

(SEAL)

APPENDIX E

TITLE 46 – SHIPPING

CHAPTER IV – FEDERAL MARITIME COMMISSION

[General Order 7; Docket No. 73-64]

Part 507 – SELF-POLICING SYSTEMS

AGENCY: Federal Maritime Commission

ACTION: Reconsideration and Modification of Final Rules

SUMMARY: Several modifications in language and numbering were made throughout the rules in the interest of clarity and simplification. The standards applicable to requests for exemption from the independent or neutral body requirement were relaxed. Reporting requirements were simplified. The term "associate" was more clearly defined and its use restricted. A provision was added which prohibits rate-fixing agreements from preventing the release of self-policing body records to the Commission.

DATES: To become effective January 1, 1979

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SUPPLEMENTAL INFORMATION:

The Commission has before it 19 Petitions for Reconsideration of its April 26, 1978 Report and Order (April Order) amending Part 528 of its Rules. General Order 7, 46 C.F.R. Part 528, 43 Fed. Reg. 18175.[1] A Reply to

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[1]Petitions were filed by Sea-Land Service, Inc., and the ocean carriers comprising the membership of the following section 15 organizations:

Gulf/Mediterranean Ports Conference; Far East Conference; Pacific Westbound Conference; Atlantic and Gulf-Indonesia Conference and Atlantic and Gulf-Singapore, Malaya and Thailand Conference (jointly); seven conferences serving areas of India, Pakistan, Ceylon, Burma, East Africa, South Africa, Bangladesh, the Red Sea and the Gulf of Aden (jointly); Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, and West Coast of Italy/North Atlantic Conference (jointly); North Atlantic Mediterranean Freight Conference and Greece/U.S. Atlantic Rate Agreement (jointly); Mediterranean-North Pacific Coast Freight Conference and New Zealand Rate Agreement (jointly); U.S. Atlantic & Gulf/Australia-New Zealand Conference and Australia/Eastern U.S.A. Shipping Conference (jointly); Spanish Eastbound Freight Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement; Rate Agreement No. 8900; Pacific Coast European Conference; Japan/Korea-Atlantic & Gulf Freight Conference and Trans-Pacific Freight Conference of Japan/Korea (jointly); Agreement Nos. 7190, 192, 8190, 90, 191, 8100 and 9474 (jointly); Agreement Nos. 10107, 10108, 7190, 192, 9190, 90, 191, 5700, 5600, 8100, 9474 and 14 (jointly); and 15 North Atlantic Conferences (jointly). United States Lines, Inc., disassociated itself from several of the Petitioners. The viewpoints of various conference members occasionally diverged on specific issues raised in their joint petitions.

Petitions for exemption from the requirement of establishing an independent self-policing body were received from the ocean carriers comprising the South Sea Islands Rate Agreement, Pacific Coast Rate Agreement, Pacific Coast Australasian Tariff Bureau, and Australia Pacific Coast Rate Agreement. These carriers contend that their activities meet the standards for exemption found in

[footnote continued]

Petitions was filed by the Commission's Bureau of Hearing Counsel (Hearing Counsel).

Part 528 of the Rules prescribes standards for self-policing by ocean carriers participating in rate fixing agreements approved under section 15 of the Shipping Act, 1916.[2] The April Rules were adopted after analysis of comments received in response to regulations proposed on October 17, 1973 (Proposed Rules).[3]

The instant Petitions urge the retraction of all or part of provisions modified by the April Order and raise the following general objections to that Order: (1) the Commission lacks authority to require an independent self-policing authority or to direct any specific type of self-policing activity; (2) some of the regulations are

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section 528.4(b)(3) of the rules published on April 26, 1978 (April Rules), but alternatively request that if exemption is denied under the April Rules, that section 528.4(b)(3) be modified to whatever extent the Commission deems necessary to grant them an exemption. These petitions add nothing of substance to the instant proceeding and are being processed solely as exemption petitions.

Several Petitioners, as well as a number of other carriers not seeking reconsideration, requested a stay of the July 1, 1978 effective date of revised Part 528. On June 26, 1978 the Commission postponed the effective date until September 15, 1978, 43 Fed. Reg. 28496 (1978).

[2] 46 U.S.C. 814 states, in pertinent part, that:

> "The Commission shall disapprove [a section 15 agreement], after notice and hearing, on a finding of inadequate policing of the obligations under it, or failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints."

[3] 38 Fed. Reg. 28841. The Proposed Rules were themselves a modification of earlier self-policing proposals contained in a broader section 15 rule making. Docket No. 73-5, 38 Fed. Reg. 4982. Unless otherwise indicated, references to particular section numbers are to the numbers designated in the April Rules.

vague and unlikely to produce uniform or reliable results; (3) inadequate notice was given of certain features contained in the final regulations, especially the reporting requirements; (4) self-policing should also be required for carriers which do not belong to rate-fixing agreements; and (5) the rules may not be implemented until General Accounting Office review has been completed pursuant to the Federal Reports Act, 44 U.S.C. 3512(c).

The Commission stayed the effective date of Part 528 through September 15, 1978 and will not implement the finally revised version adopted today until January 1, 1979, or 30 days following the completion of General Accounting Office review, whichever is later. Nothing more is required to comply with the Federal Reports Act.

Petitioners' jurisdictional argument (1) and their claim that independent carriers should also be subject to Part 528(4) were fully considered in the April Report. In 1961 Congress concluded that carrier conferences must be adequately self-policed in order to continue receiving an exemption from the antitrust laws. P.L. 87-346, 75 Stat. 764. Independent carriers are not subject to section 15's express self-policing requirement. The conferences therefore cannot claim that the Commission's failure to place identical self-policing requirements on carriers not fixing rates in violation of the Sherman Act is an arbitrary administrative action.

Petitioners' jurisdictional objection to the imposition of minimum self-policing requirements—inconsistent as it is with their request for the replacement of general phrases like "adequate staffing" with detailed specifications—fails to recognize that Part 528 does not permit the disapproval of an agreement without the notice and hearing required by law. Over ten years experience in reviewing bare bones self-policing reports has made it

evident to the Commission that existing self-policing systems rely primarily upon member initiated complaints, and have failed to confront or control major incidents of rebating in both the Atlantic and Pacific trades.[4] Under such circumstances no evidentiary hearings or detailed factual findings are necessary to support our determination that independent self-policing bodies with broad investigatory powers and more detailed reporting responsibilities are necessary features of adequate self-policing—as a general rule. To the extent a particular factual setting may warrant a different result, the Commission has provided a procedure for exempting smaller conferences operating in relatively "clean" trades from the requirement of retaining an independent self-policing body.

Petitioners' remaining objections (2 and 3) should be met by the modifications in the April Rules being adopted today. The Commission's 1973 Notice of Proposed Rule Making informed all parties of the general scope of this proceeding. Although that notice emphasized the independent body issue and the document availability issue,[5] it also discussed the need for more thorough investigations and specific self-policing reports than had previously been required. The Commission clearly proposed that the nature and basis of each investigation conducted, the findings of each investigation, the identity (coded) of the member investigated, the

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[4]Some 30 settlement agreements have been reached in FMC rebating investigations since January 1, 1977. The civil penalties incurred under these agreements exceed $5,000,000. An equal number of FMC enforcement claims seeking another $5,000,000 for alleged rebating violations is currently outstanding. Still other rebating cases are currently being processed by the Commission's staff.

[5]The manner in which the conferences would make their self-policing records available to the Commission.

exact violation found, and the exact sanction imposed be set forth in every semiannual report.[6] The April Rules merely added detail to these requirements. The majority of Petitioners' complaints concerning lack of notice also allege that certain of the reporting details added by the April Order were ambiguous or unrealistic. Upon reconsideration, the Commission has clarified and simplified the reporting requirements in accordance with Petitioners' comments whenever feasible. A section by section discussion of these comments and modifications follows.

Section 528.1 Scope and Purpose. The last two sentences of section 528.1 were not found in the 1973 proposal. Several Petitioners requested deletion of both sentences because they purportedly reflect an intention to disapprove section 15 agreements without the prior notice and hearing required by law and impose illogical and improper standards for judging agreements. The first concern is unfounded, but in the course of revising and shortening section 528.1, we have eliminated the penultimate sentence. The last sentence has also been relocated and modified to more accurately reflect the Commission's intention. The existence of a vigorous self-policing system which uncovers an appreciable number of violations during a reporting period does not create an evidentiary presumption that an agreement is or is not "adequately policed" within the meaning of section 15. Such circumstances are, however, reliable evidence of the nature and extent of malpractices in a trade and of the adequacy of a given self-policing system in curbing malpractices.

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[6]See sections 528.2(b) and 528.4(a) of the Proposed Rules. The April 25, 1974 reply comments of the North Atlantic Conferences illustrates Petitioners' awareness that greater specificity in semiannual reporting was under consideration.

Section 528.2. General Requirements. Several commentators objected to the definition of the term "associates" found in section 528.2, and to its use in sections 528.3(a), (b) and (d) and 528.6(10)(ii), where it could be construed as imposing self-policing *sanctions* upon persons not subject to a rate fixing agreement. Revisions have been made in former sections 528.3 and 528.6 to clarify the Commission's intention that only agreement *members* are subject to self-policing sanctions.

The fact remains that members may violate an agreement through a number of devices, including the use of intermediaries, and it is important that self-policing authorities be empowered to examine the activities and records of those intermediaries most likely to be employed. Accordingly, the definition of "associates" has been revised to eliminate the allegedly unnatural phrase "corporate relation," and include all agents, employees, or other persons subject to the *control* of a member, persons *controlling* a member, and persons *controlled by* persons who control a member.[7] Members must arrange for self-policing authorities to have access to and the cooperation of such "associates." Protection against the possibility that self-policing investigations might result in unrestricted invasions of the non-Shipping Act activities of corporate parents and subsidiaries has been provided by the inclusion of a limited challenge for relevancy procedure in final section 528.2(c).

Section 528.3(c) and 528.4(c). Duty to Investigate Complaints. Exception was taken to language in sections

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[7]The Commission considers it unnecessary to define the term "control" in Part 528, but intends that the term shall include all incidents of "working" or "*de facto*" control, whether achieved through ownership, common management or both.

528.3(c) and 528.4(c) stating that the self-policing authority must investigate all complaints received from any source. It was contended that these provisions could be read as requiring all complaints to be investigated in the same manner, no matter how "frivolous, unreliable, stale or malicious" they might be. This was not the Commission's intention. Self-policing authorities are expected to be both thorough and energetic, but need not adhere to unrealistic and nondiscretionary standards. Former sections 528.3 and 528.4 have been modified to clarify this situation and accommodate some of Petitioners' complaints.

The final regulations shall require self-policing bodies to promulgate reasonable procedures for the submission of complaints and to investigate all complaints. Self-initiated on-site investigations must also be conducted regularly (*e.g.*, annually) into the activities of each member line. It is unnecessary, however, for all investigations to be identical in scope. Self-policing bodies are expected to possess reasonable discretion in conducting their investigations. It is sufficient that each allegation be examined in a manner and to an extent which is reasonable under the circumstances.

Self-policing bodies may establish procedures for investigating written complaints, provided that oral and other informal communications (including anonymous messages) continue to be received and investigated. A self-policing body shall not require a complaint to be in writing or the identity of the complainant to be revealed before commencing an investigation. Petitioners failed to demonstrate a reasonable basis for limiting the class of persons who may lodge complaints and the final rules allow no such restrictions.

Section 528.4(b)(3). Exemption Petitioners. The April Rules provided for exemptions from the independent self-policing body requirement of section 528.4(b) when it is demonstrated that an agreement has few members, applies to a narrow range of ports, handles only a small percentage of cargo *in the trade*, and the trade has been relatively free of malpractices. It is now alleged that these factors are rigid and unrealistic—especially the "percentage of the trade" standard—and will preclude many, if not all, small conferences from qualifying.

Modifications have been made in the final rules to provide a more flexible approach to the granting of waivers. Determinations will be made on a case-by-case basis where it appears that maintaining an independent self-policing body would unfairly burden a conference because of the size and condition of the trade and the probable effectiveness of the alternative self-policing arrangements proposed.

Section 528.3(e). Identity of Complainant. Two petitioning conferences requested that the provisions allowing self-policing bodies to withhold the name of a complainant be amended to *require* the deletion of this information from any materials furnished an accused member. The only support offered for this request was the unclear assertion that the existing language is "inconsistent with the Commission's effort to give the industry effective self-policing" (emphasis supplied). The Commission believes it preferable to permit divergent practices in this area. Self-policing bodies may reveal or withhold the names of complainants as may best enable them to effectively investigate, and curb, malpractices. They should not, of course, reveal identities in circumstances which encourage retaliation by or against members, or withhold identities when it would unfairly prejudice the

member's ability to rebut any material allegations made against it (*e.g.*, if a case depended upon the statement of an unknown accuser).

Sections 528.4(b) and 528.6(a). Application of Part 528 to "Misrating Programs." Some conferences maintain special programs for inspecting cargo carryings and shipping documents, ascertaining cargo misdescriptions or mismeasurements, and requiring that member lines correct any misratings so discovered. These misratings are typically unintentional tariff deviations resulting from clerical errors or reliance upon cargo measurements and descriptions provided by a shipper. It appears that most misrating programs are not presently conducted by self-policing authority personnel, in part because the conferences do not consider misratings to be "malpractices."[8] The April Report firmly rejected the notion that "malpractices" could be limited to intentional breaches, but did state that conferences could establish separate investigative bodies for detecting misratings provided that such bodies also complied with Part 528 of the Rules. Several Petitioners commented upon an alleged lack of clarity concerning the status of "misrating programs" under the April Rules, but proposed no amendments to correct the purported problem.

The reporting requirements of section 528.6 have been modified to differentiate between unintentional misratings discovered by the self-policing authority and those discovered by other organizations. This modification does not alter the requirement that misratings be treated as a

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[8]Petitioners recognize that not all misratings are innocent or unintentional, and at least some of them provide for repeated or otherwise suspicious incidents to be referred to the self-policing body for investigation.

breach of the rate-fixing agreement, but should further indicate that a nonindependent "misrating program" may co-exist with a self-policing authority. A conference is welcome to take additional steps to curtail misratings. The critical factor is whether the conference has clearly authorized its self-policing authority to investigate any and all misratings, the self-policing body actually exercises this authority when circumstances reasonably require it, and appropriate damages are assessed for both unintentional overcharges and undercharges. When a "misrating program" is not independent of the conference and its membership, the self-policing authority must be assured of regular and complete access to all of the "misrating program's" findings, reports and records.

Section 528.6 Disclosure of Carrier Identity. One of Petitioners' major interests throughout this proceeding has been to avoid exposing conference members to civil or criminal penalties under the Shipping Act by virtue of their compliance with section 15's self-policing requirement. Consequently, objections were raised to some of section 528.6's reporting requirements because of the possibility that literal compliance would permit the Commission to ascertain the identity of the accused member.[9] The semiannual report is not intended to routinely reveal *which* members might have violated the Shipping Act during the reporting period. Although the Commission intends to make appropriate use of semiannual reports in its enforcement activities, the reports will neither be examined for the purpose of ascertaining carrier identity nor be treated as evidence that a violation

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[9] Disclosure of the "location" of investigations and listing all past violations within a five year period were particularly mentioned in this regard.

has occurred. Modifications have therefore been made in the final rule which should lessen its alleged susceptibility to "identity disclosure."

This does not mean, however, that carrier identities are not of legitimate interest to the Commission in a variety of contexts and may not be obtained under the Shipping Act. Accordingly, a new provision has been added to final section 528.1 stating that rate-fixing bodies shall not forbid compliance with a Commission request for self-policing authority records. This requirement merely restates existing Commission policy in this area.[10]

One of the primary justifications for the conference system is its potential for curbing malpractices. Section 15 plainly requires self-policing. Congress also intended the Shipping Act to be enforced. It is neither improper nor unfair for the Commission to employ self-policing data in aid of its wider responsibility to fairly and effectively enforce the Shipping Act.[11] A conference imposed penalty for breach of a rate fixing agreement is conceptually and legally distinct from a penalty for Shipping Act violations. Both are a means toward the common end of eliminating malpractices.

However, because the Commission's enforcement activities are not revenue generating measures, and because the Commission wishes to promote effective self-policing to

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[10]See *Agreement No. 5600-36* and *Agreement No. 5660-23*, Orders Denying Reconsideration, decided simultaneously herewith.

[11]The complaint of "unfairness" in disclosing member identities appears to consist solely of the possibility that members may eventually be required to pay Shipping Act penalties. Examination of self-policing records is not substantially different from the examination of bills of lading or other commonly maintained carrier records.

the greatest extent practicable, it shall henceforth be our policy to afford significant weight to any self-policing damages paid by a carrier when the same conduct of that carrier becomes the object of an FMC civil penalty claim. As a minimum, credit shall be given for damages paid under a self-policing system. In the case of isolated, less serious Shipping Act violations, no civil penalty claim shall be pursued when the carrier has cooperated fully with the Commission and reasonable self-policing penalties have been paid. To help effectuate this policy, final section 528.1(c) shall also forbid rate-fixing bodies from prohibiting their member lines from disclosing self-policing sanctions imposed against them (or any other aspect of their own dealings with the self-policing system) should they desire to do so. Such disclosures may be made on the member's own motion or in response to a Commission order.

Section 528.6(b) Certification of Reports. Petitioners object to section 528.5(b)'s requirement that self-policing reports be certified for accuracy and completeness by the reporting officer, the head of the policing authority, and any impartial arbitrators employed during the reporting period. It was contended that the various persons involved would not have personal knowledge of the report's entire contents and should therefore limit their certification to those matters over which they do have such knowledge.

The Commission has modified the rule to eliminate the need for three certifications. Final section 528.5(d) now requires the conference "reporting officer" to certify that the document transmitted is the report of the self-policing authority designated by the conference in full conformity with Part 528 of the Commission's Rules. The head of the self-policing authority must certify the

accuracy and completeness of the report (including arbitration decisions). Both certifications shall be made under penalty of perjury and may be sworn to before a notary or may be an unsworn declaration pursuant to 28 U.S.C. 1746. It is incumbent upon the reporting officer to oversee the activities of the self-policing authority and to have personal knowledge of its staffing, budget, investigative policies and general operations. No certification shall be required from the impartial arbitrator. All matters brought before it and all decisions that it renders shall be reported by the self-policing authority.

Section 528.6(a) Reporting Requirements Generally. Perhaps the most commonly protested provision of the April Rules was section 528.6. Petitioners claimed that certain terms appearing in the reporting requirements for the first time (*e.g.*, "cargo inspections," "office record examinations," "intelligence gathering activities") were ambiguous and that literal compliance with section 528.6 would be truly burdensome and generate little information of practical value to the Commission. The need to report all of a member's past breaches for a five year period was also viewed as onerous, both because of the length of the period and the rule's failure to indicate whether the requirement arose immediately or was to be applied prospectively.

The Commission has modified section 528.6 to eliminate the allegedly vague terms, reduce the "past violations period" to three years and apply section 528.6(a)(10)(ii) prospectively.

Other Modifications. The Commission has generally edited and renumbered the April Rules without intending to alter their substance. One such editorial change was the recognition that the term "impartial adjudicator" and "impartial arbitrator" are considered interchangeable.

There have also been certain substantive changes in the Final Rules.

The inclusion of a specific prohibition against agreement provisions which attempt to block the disclosure of self-policing documents or activities to the Commission has already been discussed. Another substantive amendment has been to require self-policing authorities to maintain detailed records of their activities for a five year period (final section 528.3(f)). These records must include the names of the accused members (and any associates) involved in any alleged, potential or actual breach. Both the self-policing authority records and the semiannual self-policing report must assign case or processing numbers to all investigations, whether instituted by complaint or on the self-policing authority's own initiative.[12] All investigations need not be of the same duration or extent, and it is assumed that self-initiated "investigations" into unintentional misratings would consist of little more than the routine notification of the member of its apparent liability for the penalty prescribed for such breaches.

A further amendment with substantive effect requires a description of the self-policing authority and the impartial arbitrator in the semiannual report (final section 528.5(b)).

THEREFORE, IT IS ORDERED, That the various Petitions for Reconsideration filed in this proceeding are granted to the extent indicated above and denied in all other respects; and

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[12]A relatively simple approach to this requirement would be to designate complaint cases by the letter "C" and a number, and to designate self-instituted investigations by the letter "I" and a number.

IT IS FURTHER ORDERED, That pursuant to section 4 of the Administrative Procedure Act and sections 14, 15, 16, 18(b), 21, 35 and 43 of the Shipping Act, 1916, Part 528 of the Commission's Rules is amended as set forth in the attached appendix; and

IT IS FURTHER ORDERED, That revised Part 528 of the Commission's Rules shall become effective January 1, 1979, provided that General Accounting Office review pursuant to 44 U.S.C. 3512(c) has been completed by that date; and

IT IS FURTHER ORDERED, That all conference agreements and other rate-fixing agreements approved under section 15 of the Shipping Act, 1916, shall be amended to conform to the requirements of revised Part 528 of the Commission's Rules and filed with the Commission on or before January 1, 1979; and

IT IS FURTHER ORDERED, That this proceeding is discontinued. By the Commission.*

Joseph C. Polking
Assistant Secretary

(SEAL)

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*Commissioner Bakke dissents in part. His views will be issued separately.

APPENDIX

PART 528 – SELF-POLICING REQUIREMENTS FOR SECTION 15 AGREEMENTS

528.0 Purpose and Scope

528.1 General Requirements

528.2 Specific Requirements: Self-Policing Provisions

528.3 Policing Authorities (Minimum Requirements)

528.4 Impartial Arbitrators (Minimum Requirements)

528.5 Reporting Requirements

528.6 Two Party Rate-Fixing Agreements—Exemptions.

AUTHORITY: This Part is issued pursuant to sections 14, 15, 16, 18(b), 21, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 812, 814, 815, 817(b), 820, 833a and 841a).

528.0. *Purpose and Scope*

(a) Section 15 of the Shipping Act, 1916, prohibits the approval of agreements which are not adequately self-policed. It also contemplates that self-policing provisions be included in certain agreements subject to the Shipping Act, and that the Commission be kept informed of the manner in which such provisions are being implemented. The provisions of this Part are designed to establish minimum standards for judging the adequacy of self-policing activities, assist ocean carriers obtain expeditious approval of their section 15 agreements insofar as self-policing is concerned, provide the Commission with reliable information concerning the nature and performance of self-policing systems, and curtail rebating and other malpractices by ocean carriers.

(b) This Part shall apply to all conference and other rate-fixing agreements between common carriers by water

in the foreign or domestic offshore commerce of the United States (hereafter referred to as "agreements"), whether or not previously approved by the Commission.

528.1 *General Requirements*

(a) Every agreement shall contain provisions establishing and describing a system for self-policing its members. These provisions shall describe the methods employed and the standards used to investigate, adjudicate and penalize breaches of the agreement by the common carriers by water signatory thereto (hereafter referred to as "members"), and shall include within their scope the activities of all persons, firms, associations, or corporations that are agents, employees or affiliates of members, or are otherwise subject to the control of a member, or which themselves control a member, or are commonly controlled by any person, firm, association or corporation which controls a member (hereafter referred to as "associates").

(b) Self-policing provisions shall establish both a policing authority and an impartial "arbitrator" or "adjudicator" and describe the functions and authority of each entity. The impartial arbitrator shall be functionally separate and distinct from the policing authority.

(c) No self-policing system shall contain provisions which purport to:

(1) deny access to or copies of any self-policing records, statistics, reports, or other information (including the identity of members) in contravention of a duly issued order of the Federal Maritime Commission (or a Commission employee with delegated authority to issue such orders); or

(2) preclude any of its members from disclosing the nature and extent of their *own* involvement with

the self-policing authority (*e.g.*, any damages paid by the member) in any administrative or judicial proceeding to enforce the Shipping Act.

(d) Complaince with the requirements of this Part shall not relieve rate fixing bodies of their absolute responsibility to adequately police their activities or preclude the Commission from disapproving an agreement when sufficient evidence of rebating or other malpractices exists to warrant a conclusion that the members' self-policing efforts have been inadequate.

528.2 *Specific Requirements: Self-Policing Provisions*

Agreements shall contain the following self-policing provisions:

(a) *Breaches (general).* A statement that any violation or breach of any provision of the agreement, or any tariff, rules or regulations promulgated thereunder (hereafter referred to as a "breach"), by any member of the agreement (directly or through an associate) shall subject such member to self-policing sanctions;

(b) *Permissable Damages.* A statement specifying the maximum damages, or range of damages, or the method of calculating the damages, which may be assessed against members of the agreement upon finding that such members have committed a breach. Such statement may specify damages for specific breaches and a general category of breaches, or both, and may relate to each and every breach, or to the number of times the member has previously been found guilty of a breach;

(c) *Investigation of Breaches.* An effective procedure for investigating all matters which are the subject of complaints or which otherwise suggest or allege the existence of breaches;

(1) The procedure shall require the self-policing authority to:

(i) receive or gather information concerning breaches from any and all sources;

(ii) make investigations both in response to complaints and upon its own initiative;

(iii) examine, audit or inspect, upon demand, with or without notice and wherever located: any books, records, accounts, invoices, bills of lading or other documents, cargo, containers, ships, property, and facilities owned, used, or transported by any member of the agreement or its associates which *may be* relevant to the member's participation in the trade. Provided, however, that examination of particularly identified materials may be postponed for a reasonable period pending a prompt determination of relevancy by the impartial arbitrator under conditions which assure that the materials in question are sealed or otherwise kept unaltered during the determination period;

(iv) adopt and publicize procedures for the filing of complaints;

(v) compile and retain for at least five years a complete and thorough record of all its investigatory and prosecutorial activities, including a description of all complaints, the basis, nature and scope of all self-initiated investigations, and the disposition of all investigations.

(2) The procedure shall require all officers, employees, and associates (including officers, employees and controlling owners) of members to cooperate with, and freely provide information to, the policing authority and its agents;

(d) *Adjudication of Breaches.* A procedure for adjudicating alleged breaches which affords accused members the right to a hearing before an impartial arbitrator. The impartial arbitrator shall adjudicate such claims solely and finally, either initially or upon review *de novo* on the record of an initial determination by the policing authority. "Review *de novo* on the record" requires the impartial arbitrator to have full authority to affirm, modify or set aside any finding of fact, conclusion of law, or penalty made or imposed by the policing authority;

(e) *Procedural Guarantees.* A statement that fundamental fairness will be afforded all members accused of committing a breach (hereafter referred to as "the accused"), which includes the following specific procedural guarantees:

(1) The accused shall be charged in writing, within a reasonable time prior to the initial hearing, in a manner which fairly and clearly discloses the nature of the alleged breach. Such charges need not reveal the identity of the complainant;

(2) The accused shall be furnished with all evidence within a reasonable time prior to the initial hearing. Evidence developed thereafter shall also be furnished to the accused and a delay granted, if necessary, to allow it an opportunity to use such evidence in its defense. The identity of the complainant may be deleted from any evidence furnished the accused;

(3) The accused shall be given a full and fair opportunity to rebut or explain any evidence introduced against it and to present evidence which might show mitigating or extenuating circumstances;

(4) The impartial adjudicator shall receive and consider only that evidence which has been furnished to the accused by the self-policing authority or has been furnished by the accused in its defense;

(f) *Designated Official.* A statement designating a particular officer or official of the rate-fixing body to be responsible for the filing and certifying or self-policing reports with the Commission in accordance with section 528.5 of this Part;

Section 528.3 *Policing Authorities (Minimum Requirements).*

(a) Policing authorities shall have an adequate and qualified staff, adequate facilities and an adequate budget.

(b) Policing authorities shall be headed by, and composed of, persons not otherwise employed by, having any financial interest in, or affiliated with, the conference or rate-fixing body established by the agreement or any member or associate thereof; Provided, however, that:

(1) An individual or entity may act as the policing authority for more than one rate-fixing body;

(2) An independent certified public accountant (referred to hereafter as an ICPA) may act as the policing authority, even though it has a client which is a member of the agreement or an associate of such member, where such relationship is disclosed prior to being named as the policing authority and it is disqualified from acting as the policing authority with respect to the member which is, or whose associate is, a client of the ICPA. If the ICPA named as the policing authority discloses that it has a member of the agreement or an associate of such member as a client, an

alternate policing authority must be appointed to receive and investigate any complaints against such member;

(3) Upon petition to the Commission, an exemption may be sought to allow officers or employees of a rate-fixing body to act as the head of, or be assigned to duties under, the policing authority, if such person or persons are not otherwise employed by, affiliated with, or have any interest in, any member or any associate of a member. Petitions for exemption will not be lightly granted and must include a convincing showing that:

(i) the persons conducting self-policing activities are qualified and their self-policing activities would not substantially conflict with their other duties and responsibilities;

(ii) the agreement is so limited in scope that the retention of an independent self-policing authority would impose an unrealistic financial burden on the members. The number of members, the financial condition of the members, the nature and extent of the trade, the competitive circumstances prevailing in the trade, and other activities of the members both within and without the trade (*e.g.*, participation in other agreements) are all relevant considerations;

(iii) the trade covered by the agreement has been relatively free of rebating or other conduct violative of the Shipping Act in the five years preceding the year when exemption is sought and is likely to continue to be characterized by a minimal level of such malpractices.

(c) The policing authority of each agreement shall be required to establish reasonable written procedures for

the receipt and investigation of complaints which shall be made available to any person upon request. Such procedures may include special provisions for the handling of written complaints and for summary investigation of frivolous or incomplete allegations (whether written or not). These procedures may not, however, require that complaints be in writing or restrict the class of persons entitled to lodge a complaint.

(d) Policing authorities shall be required to investigate all complaints filed in accordance with its established procedures.

(e) Policing authorities shall be required to conduct self-initiated investigations whenever they receive information providing reasonable cause to do so and to periodically conduct self-initiated investigations into the activities of each member. All self-initiated investigations shall include, but not necessarily be limited to, the unannounced inspection of books, records, accounts, shipping documents, invoices, cargo, ships, containers, equipment, and facilities of the member and its associates.

(f) Policing authorities shall compile and retain for at least five years a sufficient written record of their activities to demonstrate compliance with this Part. This record shall include:

(1) all complaints received (written or oral), the processing or case numbers assigned to each complaint, a description of the steps taken to investigate each complaint (including hearings or arbitration proceedings) copies or summaries of the evidence gathered, and the final disposition of each investigation;

(2) a chronological log summarizing all information (other than complaints) received or gathered which alleges or suggests the existence of a breach and describing the consideration given to this information, including all reports of unintentional cargo misdescriptions and mismeasurements, anonymous tips, and rumors of malpractices;

(3) a description of all self-initiated investigations, the processing or case numbers assigned to each investigation, a description of all investigatory measures employed (including hearings or arbitration proceedings), copies or summaries of the evidence gathered, and the final disposition of each investigation;

(4) a brief statement as to why each investigation was finally disposed of in the particular manner chosen. This statement shall include an exact description of any breach found to have occurred, any decision of the impartial arbitrator and the nature and amount of any penalty assessed and paid.

Section 528.4 *Impartial Arbitrators (Minimum Requirements).*

(a) The impartial arbitrator shall be a totally disinterested person or entity, unaffiliated with the rate-fixing body or any member or associate thereof, and may be appointed on permanent basis or selected on an *ad hoc* basis from a panel of arbitrators pursuant to traditional rules of commercial arbitration.

(b) The impartial arbitrator shall be vested with final authority to adjudicate disputes and assess damages within the scope of the self-policing system.

(c) The impartial arbitrator shall not perform any other duties under the self-policing system with regard to any matter before it for adjudication, including investigation or prosecution.

Section 528.5 *Reporting Requirements.*

(a) Each rate-fixing body shall mail (air mail postage prepaid) or hand deliver a semiannual report to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, on or before January 31 and July 31 of each year covering that body's self-policing and adjudicatory activities during the six-month period immediately preceding the respective reporting month (*i.e.*, January or June).

(b) Each semiannual self-policing report may exclude the identity of all parties to an allegation of breach, investigation or penalty assessment, but shall contain the following detailed information:

(1) The name and address of the self-policing body employed during the reporting period and a complete description of its staff, facilities, and budget, and the name and address of the impartial arbitrator employed during the reporting period and a description of its qualifications;

(2) The date, location (community or port area where inspection occurred) and nature of each examination or inspection (including audits) or cargo, facilities, shipping documents, or office records performed during the reporting period. The type and approximate number of accounts, documents, cargo containers, and other items inspected shall also be stated. Each such inspection shall be correlated to a particular investigation bearing a processing or case number;

(3) The number of cargo misdescriptions or mismeasurements detected by:

(i) the self-policing authority or any division thereof;

(ii) any other organization retained by the rate-fixing body to make misrating determinations and regularly report them to the self-policing authority. When such a separate "misrating committee" or similar organization is employed by a rate-fixing body, the self-policing report shall also identify that organization by name, and address, and provide a thorough description of its staffing (including other affiliations with the conference or its members), authority and routine activities, and describe the procedures by which it reports its findings to the self-policing authority;

(4) The number of breaches of the agreement (other than unintentional cargo misdescriptions and mismeasurements) which were detected through the investigation of complaints;

(5) The number of breaches of the agreement (other than unintentional cargo misdescriptions and mismeasurements) which were detected by self-initiated investigations;

(6) A thorough summary of the basis, nature, and scope of each investigation commenced during the reporting period, including any hearings or arbitration proceedings. Each investigation shall be identified by a processing number and the summary shall indicate whether the investigation was initiated by complaint or upon the initiative of the self-policing authority;

(7) A list of information received or gathered during the reporting period alleging or suggesting the existence of a breach, but which was not made the subject of an investigation;

(8) A list (by processing number) of investigations commenced in previous reporting periods and still pending, and a description of the action taken with respect to each during the reporting period (including hearings and arbitration proceedings);

(9) A list and description (by processing number) of all final actions taken with respect to investigations of any type. An action is not "final" unless:

(i) the investigation revealed insufficient evidence to establish a breach; or

(ii) the accused was assessed damages, either based on a voluntary settlement or a decision rendered by the policing authority or the impartial arbitrator.

(10) When a final action involves an assessment of penalties, the report shall also include:

(i) a detailed description of the alleged or adjudicated breach, the amount or type of penalty assessed, and whether the assessment was met;

(ii) a list of all other breaches (other than unintentional cargo misdescriptions and mismeasurements) committed by the member during the period subsequent to the effective date of this Part, but not greater than three years prior to the final action in question.

(c) The report shall clearly indicate those final actions handled by the policing authority and those matters,

including rulings on the relevancy of documents or things sought to be examined by the policing authority, handled by the impartial arbitrator.

(d) The reporting officer designated pursuant to section 528.2(f) of this Part shall certify under penalty of perjury that the semiannual report has been prepared by the self-policing authority specifically designated by the rate-fixing body to act in full accordance with the requirements of this Part during the reporting period. The accuracy and completeness of the report shall be sworn to under penalty of perjury by the head of the designated self-policing authority.

(e) If there are no complaints, investigations, or final actions during the period, the report shall contain an express statement to this effect as to each category of information required by subparagraph (b) above.

Section 528.6 *Two Party Rate-Fixing Agreements.*

Rate-fixing agreements with no more than two signatory parties shall be exempt from the requirements of this Part.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-626

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, ET AL.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 9, 1981.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 23rd
day of January, 1981

APPENDIX G

STATUTORY REFERENCES

Section 15 of the Shipping Act, 1916, 46 U.S.C. §814 provides, in relevant part, that:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.
>
> The Commission shall disapprove any such agreement, after notice and hearing, on a finding of

inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

APPENDIX H

46 C.F.R. Part 528 provides, in relevant part:

§528.1 *General requirements.*

(a) Every agreement shall contain provisions establishing and describing a system for self-policing its members. These provisions shall describe the methods employed and the standards used to investigate, adjudicate, and penalize breaches of the agreement by the common carriers by water signatory thereto (hereafter referred to as "members"), and shall include within their scope the activities of all persons, firms, associations, or corporations that are agents, employees, or affiliates of members, or are otherwise subject to the control of a member, or which themselves control a member, or are commonly controlled by any person, firm, association, or corporation which controls a member (hereafter referred to as "associates").

(b) Self-policing provisions shall establish both a policing authority and an impartial "arbitrator" or "adjudicator" and describe the functions and authority of each entity. The impartial arbitrator shall be functionally separate and distinct from the policing authority.

(c) No self-policing system shall contain provisions which purport to:

(1) Deny access to or copies of any self-policing records, statistics, reports, or other information (including the identity of members) in contravention of a duly issued order of the Federal Maritime Commission (or a Commission employee with delegated authority to issue such orders); or

(2) Preclude any of its members from disclosing the nature and extent of their own involvement with the

self-policing authority (e.g., any damages paid by the member) in any administrative or judicial proceeding to enforce the Shipping Act.

(d) Compliance with the requirements of this part shall not relieve rate fixing bodies of their absolute responsibility to adequately police their activities or preclude the Commission from disapproving an agreement when sufficient evidence of rebating or other malpractices exists to warrant a conclusion that the members' self-policing efforts have been inadequate.

§528.2 *Specific requirements: self-policing provisions.*

Agreements shall contain the following self-policing provisions:

(a) *Breaches (general).* A statement that any violation or breach of any provision of the agreement, or any tariff, rules or regulations promulgated thereunder (hereafter referred to as a "breach"), by any member of the agreement (directly or through an associate) shall subject such member to self-policing sanctions;

(b) *Permissable damages.* A statement specifying the maximum damages, or range of damages, or the method of calculating the damages, which may be assessed against members of the agreement upon finding that such members have committed a breach. Such statement may specify damages for specific breaches and a general category of breaches, or both, and may relate to each and every breach, or to the number of times the member has previously been found guilty of a breach;

(c) *Investigation of breaches.* An effective procedure for investigating all matters which are the subject of complaints or which otherwise suggest or allege the existence of breaches;

(1) The procedure shall require the self-policing authority to:

(i) Receive or gather information concerning breaches from any and all sources;

(ii) Make investigations both in response to complaints and upon its own initiative;

(iii) Examine, audit or inspect, upon demand, with or without notice and wherever located: Any books, records, accounts, invoices, bills of lading or other documents, cargo, containers, ships, property, and facilities owned, used, or transported by any member of the agreement or its associates which may be relevant to the member's participation in the trade. *Provided, however,* That examination of particularly identified materials may be postponed for a reasonable period pending a prompt determination of relevancy by the impartial arbitrator under conditions which assure that the materials in question are sealed or otherwise kept unaltered during the determination period;

(iv) Adopt and publicize procedures for the filing of complaints;

(v) Compile and retain for at least 5 years a complete and thorough record of all its investigatory and prosecutorial activities, including a description of all complaints, the basis, nature and scope of all self-initiated investigations, and the disposition of all investigations.

(2) The procedure shall require all officers, employees, and associates (including officers, employees and controlling owners) of members to cooperate with, and freely provide information to, the policing authority and its agents;

(d) *Adjudication of breaches.* A procedure for adjudicating alleged breaches which affords accused members the right to a hearing before an impartial arbitrator. The impartial arbitrator shall adjudicate such claims solely and finally, either initially or upon review de novo on the record of an initial determination by the policing authority. "Review de novo on the record" requires the impartial arbitrator to have full authority to affirm, modify or set aside any finding of fact, conclusion of law, or penalty made or imposed by the policing authority;

(e) *Procedural guarantees.* A statement that fundamental fairness will be afforded all members accused of committing a breach (hereafter referred to as "the accused"), which includes the following specific procedural guarantees:

(1) The accused shall be charged in writing, within a reasonable time prior to the initial hearing, in a manner which fairly and clearly discloses the nature of the alleged breach. Such charges need not reveal the identity of the complainant;

(2) The accused shall be furnished with all evidence within a reasonable time prior to the initial hearing. Evidence developed thereafter shall also be furnished to the accused and a delay granted, if necessary, to allow it an opportunity to use such evidence in its defense. The identity of the complainant may be deleted from any evidence furnished the accused;

(3) The accused shall be given a full and fair opportunity to rebut or explain any evidence introduced against it and to present evidence which might show mitigating or extenuating circumstances;

(4) The impartial adjudicator shall receiver and consider only that evidence which has been furnished to

the accused by the self-policing authority or has been furnished by the accused in its defense;

(f) *Designated official.* A statement designating a particular officer or official of the rate-fixing body to be responsible for the filing and certifying of self-policing reports with the Commission in accordance with §528.5;

§528.3 *Policing authorities (minimum requirements).*

(a) Policing authorities shall have an adequate and qualified staff, adequate facilities and an adequate budget.

(b) Policing authorities shall be headed by, and composed of, persons not otherwise employed by, having any financial interest in, or affiliated with, the conference or rate-fixing body established by the agreement or any member or associate thereof; *Provided, however,* That:

(1) An individual or entity may act as the policing authority for more than one rate-fixing body;

(2) An independent certificated public accountant (referred to hereafter as an ICPA) may act as the policing authority, even though it has a client which is a member of the agreement or an associate of such member, where such relationship is disclosed prior to being named as the policing authority and it is disqualified from acting as the policing authority with respect to the member which is, or whose associate is, a client of the ICPA. If the ICPA named as the policing authority discloses that it has a member of the agreement or an associate of such member as a client, an alternate policing authority must be appointed to receive and investigate any complaints against such member;

(3) Upon petition to the Commission, an exemption may be sought to allow officers or employees of a

rate-fixing body to act as the head of, or be assigned to duties under, the policing authority, if such person or persons are not otherwise employed by, affiliated with, or have any interest in, any member or any associate of a member. Petitions for exemption will not be lightly granted and must include a convincing showing that:

(i) The persons conducting self-policing activities are qualified and their self-policing activities would not substantially conflict with their other duties and responsibilities;

(ii) The agreement is so limited in scope that the retention of an independent self-policing authority would impose an unrealistic financial burden on the members. The number of members, the financial condition of the members, the nature and extent of the trade, the competitive circumstances prevailing in the trade, and other activities of the members both within and without the trade (e.g., participation in other agreements) are all relevant considerations;

(iii) The trade covered by the agreement has been relatively free of rebating or other conduct violative of the Shipping Act in the 5 years preceding the year when exemption is sought and is likely to continue to be characterized by a minimal level of such malpractices.

(c) The policing authority of each agreement shall be required to establish reasonable written procedures for the receipt and investigation of complaints which shall be made available to any person upon request. Such procedures may include special provisions for the handling of written complaints and for summary investigation of frivolous or incomplete allegations (whether written or

not). These procedures may not, however, require that complaints be in writing or restrict the class of persons entitled to lodge a complaint.

(d) Policing authorities shall be required to investigate all complaints filed in accordance with its established procedures.

(e) Policing authorities shall be required to conduct self-initiated investigations whenever they receive information providing reasonable cause to do so and to periodically conduct self-initiated investigations into the activities of each member. All self-initiated investigations shall include, but not necessarily be limited to, the unannounced inspection of books, records, accounts, shipping documents, invoices, cargo, ships, containers, equipment, and facilities of the member and its associates.

(f) Policing authorities shall compile and retain for at least 5 years a sufficient written record of their activities to demonstrate compliance with this part. This record shall include:

(1) All complaints received (written or oral), the processing or case numbers assigned to each complaint, a description of the steps taken to investigate each complaint (including hearings or arbitration proceedings) copies or summaries of the evidence gathered, and the final disposition of each investigation;

(2) A chronological log summarizing all information (other than complaints) received or gathered which alleges or suggests the existence of a breach and describing the consideration given to this information, including all reports of unintentional cargo misdescriptions and mismeasurements, anonymous tips, and rumors of malpractices;

(3) A description of all self-initiated investigations, the processing or case numbers assigned to each investigation, a description of all investigatory measures employed (including hearings or arbitration proceedings), copies or summaries of the evidence gathered, and the final disposition of each investigation;

(4) A brief statement as to why each investigation was finally disposed of in the particular manner chosen. This statement shall include an exact description of any breach found to have occurred, any decision of the impartial arbitrator and the nature and amount of any penalty assessed and paid.

APPENDIX I

CONFERENCE AND RATE AGREEMENT PARTIES

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA

American President Lines, Ltd.**
Barber Blue Sea Line
Hapag-Lloyd AG
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Knutsen Line A/S
Korea Marine Transport Co., Ltd.
Korea Shipping Corporation
Lykes Bros. Steamship Co., Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Line
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.
Phoenix Container Liners (1976) Ltd.
Showa Line, Ltd.
The East Asiatic Company Limited
United States Lines, Inc.**
Yamashita-Shinnihon Steamship Co., Ltd.

JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE

Barber Blue Sea Line
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Korea Shipping Corporation
Lykes Bros. Steamship Company, Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Line
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.

United States Lines, Inc.**
Yamashita-Shinnihon Steamship Co., Ltd.

JAPAN-PUERTO RICO & VIRGIN ISLANDS FREIGHT CONFERENCE
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Yamashita-Shinnihon Steamship Co., Ltd.

FAR EAST CONFERENCE
Barber Blue Sea Line
Galleon Shipping Corporation
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Maritime Company of the Philippines, Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Line
Nippon Yusen Kaisha
United States Lines, Inc.**
Waterman Steamship Corporation
Yamashita-Shinnihon Steamship Co., Ltd.

PACIFIC WESTBOUND CONFERENCE
American President Lines, Ltd.**
Barber Blue Sea Line*
Galleon Shipping Corporation
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Knutsen Line
Korea Marine Transport Co., Ltd.
Maritime Company of the Philippines, Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Lines
Nippon Yusen Kaisha
Phoenix Container Liners (1976) Ltd.

Sea-Land Service, Inc.
Seapak Container Service, Inc.**
Showa Line, Ltd.
The East Asiatic Company Limited
United States Lines, Inc.**
Waterman Steamship Corporation*
Yamashita-Shinnihon Steamship Co., Ltd.
Zim Israel Navigation Company, Ltd.

AGREEMENT NO. 10107
American President Lines, Ltd.**
Barber Blue Sea Line
Kawasaki Kisen Kaisha, Ltd.
Korea Marine Transport Co., Ltd.
A.P. Moller-Maersk Line
The East Asiatic Co., Ltd.
United States Lines, Inc.**
Trans Pacific Freight Conference:
Japan Line, Ltd.
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd.

AGREEMENT NO. 10108
Barber Blue Sea Line
Kawasaki Kisen Kaisha, Ltd.
A.P. Moller-Maersk Line
United States Lines, Inc.**
New York Freight Bureau:
Japan Line, Ltd.
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Yamashita-Shinnihon Steamship Co., Ltd.

NEW YORK FREIGHT BUREAU
Japan Line, Ltd.
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Yamashita-Shinnihon Steamship Co., Ltd.

TRANS PACIFIC FREIGHT CONFERENCE (HONG KONG)
Japan Line, Ltd.
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd.

PHILIPPINES NORTH AMERICA CONFERENCE
American President Lines, Ltd.**
Barber Blue Sea Line
Galleon Shipping Corporation
Hapag-Lloyd Aktiengesellschaft
Kawasaki Kisen Kaisha, Ltd.
Lykes Bros. Steamship Co., Inc.
Maritime Company of the Philippines
Mitsui O.S.K. Lines, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.
The East Asiatic Company Limited
Waterman Steamship Corporation
Yamashita-Shinnihon Steamship Co., Ltd.

STRAITS/NEW YORK CONFERENCE
Barber Blue Sea Line
Lykes Bros. Steamship Co., Inc.
Mitsui O.S.K. Lines, Ltd.
A.P. Moller-Maersk Line
Nippon Yusen Kaisha

ATLANTIC & GULF-SINGAPORE, MALAYA AND THAILAND CONFERENCE
- Barber Blue Sea Line
- Lykes Bros. Steamship Co., Inc.
- A.P. Moller-Maersk Line

ATLANTIC & GULF INDONESIA CONFERENCE
- Barber Blue Sea Line
- Lykes Bros. Steamship Co., Inc.
- A.P. Moller-Maersk Line

PACIFIC INDONESIAN CONFERENCE
- American President Lines, Ltd.**
- Barber Blue Sea Line*
- Lykes Bros. Steamship Co., Inc.
- A.P. Moller-Maersk Line
- Showa Line, Ltd.*
- The East Asiatic Company Limited

PACIFIC STRAITS CONFERENCE
- American President Lines, Ltd.**
- Barber Blue Sea Line*
- Japan Line, Ltd.*
- Kawasaki Kisen Kaisha, Ltd.*
- Knutsen Line
- Mitsui O.S.K. Lines, Ltd.*
- A.P. Moller-Maersk Line
- Nippon Yusen Kaisha*
- Sea-Land Service, Inc.
- Showa Line, Ltd.*
- The East Asiatic Company Limited
- Yamashita-Shinnihon Steamship Co., Ltd.*

THAILAND/U.S. ATLANTIC & GULF CONFERENCE
- Barber Blue Sea Line
- Lykes Bros. Steamship Co., Inc.
- A.P. Moller-Maersk Line

THAILAND/PACIFIC FREIGHT CONFERENCE
Barber Blue Sea Line
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line
The East Asiatic Company Limited

MALAYSIA PACIFIC RATE AGREEMENT
American President Lines, Ltd.**
Barber Blue Sea Line
Knutsen Line
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line
Shipping Corporation of India**
The East Asiatic Company Limited

DELI/NEW YORK RATE AGREEMENT
Barber Blue Sea Line
Clipper Maritime
Djakarta Lloyd, P.T.
Leif Hoegh Lines
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line

DELI/PACIFIC RATE AGREEMENT
American President Lines, Ltd.**
Leif Hoegh Lines
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line
The East Asiatic Company Limited

JAVA/NEW YORK RATE AGREEMENT
Barber Blue Sea Line
Djakarta Lloyd, P.T.
Leif Hoegh Lines
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line

JAVA/PACIFIC RATE AGREEMENT

American President Lines, Ltd.**
Barber Blue Sea Line
Leif Hoegh Lines
Lykes Bros. Steamship Co., Inc.
A.P. Moller-Maersk Line
The East Asiatic Company Limited

Legend:
*Associate Membership
**Not Participating

APPENDIX J

Aide-Memoire

1. The Governments of Denmark, Finland, the Federal Republic of Germany, Japan, the Netherlands, Norway, Sweden and the United Kingdom refer to General Order No. 7 of the Federal Maritime Commission, issued September 14, 1978 and put into force from January 1, 1979, concerning the matter of conference self-policing. This new regulation requires all shipping conferences and rate agreements involving the U.S. foreign trade to establish independent agencies to perform policing of agreements by member shipping lines.

2. Under this regulation, conferences are forced to comply with the standards set forth, such as establishment of outside policing agencies and access by the F.M.C. to the documents which these agencies accumulate, because otherwise their conference agreements might be cancelled. In this regard, it is noted that show cause orders have already been issued by the F.M.C. against many of the conferences threatening cancellation of their agreements in the absence of prompt compliance with the regulation.

3. The Governments of Denmark, Finland, the Federal Republic of Germany, Japan, the Netherlands, Norway, Sweden and the United Kingdom appreciate the importance of eliminating malpractice in the foreign trade and support, in principle, this objective. However, these Governments consider that shipping conferences should, themselves, be responsible for policing their agreements. The imposition of unilateral requirements by the F.M.C. does not seem to be in accordance with this principle.

4. The Governments have noted that the F.M.C.'s self-policing rules (Section 528.5) would permit semi-

annual self-policing reports to exclude the identities of parties to an investigation. The governments, however, are concerned that as a condition of continued Section 15 approval the regulations would make available to the F.M.C. documents including documents located abroad which the self-policing organization obtain under their arrangements with the conference and rate agreements.

5. Moreover, with Commission access to self-policing documents, conference carriers would be exposed to an increased risk of being sanctioned under applicable provisions of the Shipping Act thereby discouraging carrier cooperation with the conference self-policing machinery. This would be detrimental to the goal of eliminating malpractices through self-regulation.

6. The Governments hope that the U.S. Government will reconsider the self-policing rule with a view to eliminating these objectional features.

ALEXANDER L. STEVAS
CLERK

No. 80-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, *et al.*,
Petitioners,

v.

FEDERAL MARITIME COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF PETITIONERS TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, *et al.*

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IN THE

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v.

FEDERAL MARITIME COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, *et al.*

The Federal Maritime Commission's brief in opposition cannot obscure the fact that the Commission has ignored congressionally-imposed restrictions on its power to police international shipping conferences, to the immediate detriment of the conference system and relations of the United States with foreign maritime nations.[1] Unless this Court reviews and reverses the

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[1] Cognizant of this petition, eight foreign nations have as recently as February 20, 1981, once again notified the State Department of their objections to the regulations at issue. *See* Pet. Supp. App. K, *infra*, p. 1a.

Commission's exercise of unauthorized powers, the dissolution of the conferences which Congress sought to avoid—and which has already begun as a direct result of the regulations at issue—will continue with no possibility of effective relief.

1. The Commission acknowledges that the power to compel disclosure of conference self-policing records was denied the agency by Congress in 1961 when it amended Section 15 of the Shipping Act, 46 U.S.C. § 814 (Br. in Opp. p. 13).[2] A proposal to this effect evoked such a "storm of protests"[3] from foreign and domestic carriers, representatives of foreign governments and the Department of State that it was dropped from the final bill for fear of its destructive effect on the cooperative multinational conference system. Yet the Commission continues to urge that because the present regulations do not affirmatively require production of conference self-policing records to the Commission (but instead prohibit the conferences from denying the agency access to such records), they are not inconsistent with Congress's clearly expressed intent. However, the regulations have the same "confidentiality-destroying effect" (Dissent, Pet. App. A, p. 53a), whether they are expressed in the affirmative or double negative. Moreover, the Commission has candidly announced that it intends to implement its regulations to obtain conference self-policing records for use in collateral enforcement of the Shipping Act.[4]

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[2] The Court of Appeals also conceded that such a requirement "clearly would run contrary to the legislative history of the 1961 amendments." (Pet. App. A, p. 38a.)

[3] S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 3108, 3131.

[4] Pet. App. E, pp. 117a-118a.

This use of the regulations to impose an additional penalty on a carrier already subject to the enforcement action of a conference runs directly contrary to the system of *self*-policing adopted by Congress in Section 15.

Foreign carriers and governments have already responded with alarm to the intrusion of the Commission in the self-policing process which they so vehemently opposed during the 1961 amendment of Section 15. Concern over the regulations has resulted in an exodus of foreign carriers from three shipping conferences.[5] The major foreign maritime nations have repeatedly condemned the regulations as an unwarranted intrusion into the internal affairs of the conferences.[6] A recent decree issued by the President of the Philippines, which prohibits the removal of business documents from Philippine territory without the government's consent on pain of criminal sanctions,[7] points to the growing foreign complications to implementation of the rules. Other carriers are poised to withdraw from the conferences at the first exercise by the Commission of its power to order production of conference records.

The damage to the conference system which Congress struggled to avert has thus begun. The fact that certain conferences have to date complied with the regulations on pain of dissolution by the Commission or to avoid other sanctions under the Shipping Act masks

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[5] *See* Petition of Trans-Pacific Freight Conference of Japan/Korea (hereinafter "Pet."), p. 7 n.5.

[6] *Id.* at 21; Pet. App. J and Supp. App. K.

[7] Pet. Supp. App. L, *infra*, pp. 3a-6a.

the true impact of the regulations which will be felt when actual enforcement of the regulations begins. However, as discussed below, it will by then be too late to undo the damage Congress sought to prevent.

2. Despite the Commission's suggestions to the contrary (Br. in Opp. p. 7), petitioners acknowledge the authority of the Commission to adopt legitimate regulations regarding conference self-policing (Pet. pp. 13-14). However, this undisputed rulemaking power cannot be used to achieve a result contrary to that intended by Congress. And, as even those portions of the legislative history cited by respondents establish,[8] the ability to prescribe self-policing provisions in advance and to compel disclosure of conference self-policing records are among the powers Congress denied the Commission.[9] Respondents nowhere explain how Congress, having deleted these powers from the 1961 amendments, later restored them to the agency.

3. The Commission suggests that evidence of abuses among conference members justifies its adoption of the regulations at issue. However, the agency ignores the fact that it has *not once* exercised its authority under Section 15 to disapprove an agreement based on a conference's failure to adequately police its obligations—an enforcement power which the Commission itself describes as a "weighty sanction" (Br. in Opp. p. 6). The Commission's assertion of unauthorized powers ill becomes an agency which in twenty years has

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[8] See Br. in Opp. pp. 7-11, 13.

[9] See S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3124.

not once implemented those powers Congress clearly allowed it.[10]

4. The only effective means of resolving this important question is through review by this Court. Congress has expressed deep concern that the viability of the conference system not be placed in jeopardy by the Commission's undue interference in conference affairs. The present regulations upset the careful balance between agency enforcement and conference self-regulation that Congress was at pains to achieve when it amended Section 15. To await enforcement action will ensure the very damage—conference dissolutions—that Congress sought to avoid. Furthermore, the Commission itself has argued in the past that, pursuant to the Administrative Orders Review Act, 28 U.S.C. §§ 2341-2353, a timely challenge to its general rules must immediately follow their issuance. *See Outward Continental North Pacific Freight Conference* v. *Fed-*

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[10] The Commission's belief that *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961) and *Kerr Steamship Co.* v. *United States*, 284 F.2d 61 (2d Cir. 1960), *vacated per curiam on other grounds*, 369 U.S. 422 (1962), in some way authorize compelled production of documents under Section 15 is simply wrong. These decisions addressed the question whether Federal Maritime Board orders for production of ocean carrier records located outside the United States had been lawfully issued under Section 21 of the Shipping Act, 46 U.S.C. § 820. Congress, in the 1961 amendments to the Act, expressed considerable doubt as to whether such orders could be enforced "in the face of directives not to produce from five friendly maritime nations (Belgium, Italy, Japan, the Netherlands and the United Kingdom)" and explicitly determined not to further "muddy the waters" by attempting to create a similar questionable power under Section 15. S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3132.

eral Maritime Commission, 385 F.2d 981, 982-83 n. 3 (D.C. Cir. 1967).[11] This case therefore presents the appropriate, and possibly unique, opportunity for review of this critical question concerning the limits on the Commission's authority to invade internal conference affairs.[12]

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[11] Section 4(e) of the Administrative Orders Review Act, 28 U.S.C. § 2344, provides, *inter alia,* that, on entry of a final order of the Commission, an aggrieved party has sixty days to petition to review the order in the appropriate court of appeals. In *Outward Continental, supra,* the Commission contended that conference challenges to the regulations preceding those at issue here were not timely since they were filed more than sixty days after the regulations were issued. While the court did not decide this question, it noted that

> We suggested in *Pacific Coast* that those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance.

385 F.2d at 982-83 n.3.

[12] Ironically, the Commission suggests that petitioners present their evidence concerning the destructive effects of the regulations to the agency to ensure that the regulations have not had "the unintended effect of injuring the conference system." (Br. in Opp. pp. 5-6 n.4) This contention is disingenuous, to say the least, in light of the extensive record compiled at the time of the 1961 amendments clearly indicating the disruptions that would result from the agency's exercise of the very same powers it has now assumed. Moreover, to suggest that the conferences are required to submit their grievances to the Commission misses the very point of the 1961 amendments where Congress determined that the agency was not to be judge, jury and policeman with regard to conference self-policing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX E

AIDE MEMOIRE

The Governments of Denmark, Finland, the Federal Republic of Germany, Japan, the Netherlands, Norway, Sweden and the United Kingdom, ('The Governments') refer to their Aide Memoire of June 27, 1979, concerning General Order No. 7 of the Federal Maritime Commission, issued September 14, 1978, and put into force from January 1, 1979.

As mentioned in the Aide Memoire, the Governments appreciate the importance of eliminating malpractices in the foreign trade and support, in principle, this objective. However, the Governments consider that shipping conferences should, themselves, be responsible for policing their agreements. The regulation authorizing the F.M.C. to have access to self-policing documents, would, contrary to its objective, discourage carrier cooperation with the conference self-policing machinery. Therefore, in the view of the Governments, this would be detrimental to the goal of eliminating malpractices which all the Governments, including the U.S. Government, seek to achieve.

Moreover, the Governments are particularly concerned that the regulation makes available to the F.M.C. documents, including those located abroad, which the self-policing organizations are able to obtain under their arrangements with the conferences and rate agreements.

Taking note of the recently-filed petition for certiorari submitted to the U.S. Supreme Court by the conferences, the Governments wish, at this time, to reaffirm that their position in the matter remains unchanged.

The Governments cordially trust that the U.S. Government will reconsider the matter with a view to eliminating these objectionable features.

Washington, D. C.

20 February, 1981

APPENDIX L

MALACANANG
Manila
PRESIDENTIAL DECREE NO. 1718

PROVIDING FOR INCENTIVES IN THE PURSUIT OF ECONOMIC DEVELOPMENT PROGRAMS BY RESTRICTING THE USE OF DOCUMENTS AND INFORMATION VITAL TO THE NATIONAL INTEREST IN CERTAIN PROCEEDINGS AND PROCESSES.

WHEREAS, the Government promotes, encourages and assists the business sector in its active participation in development programs designed to implement prescribed policies of the State;

WHEREAS, in pursuance of such program and in order to achieve the desired goals and objectives, the Government has authorized certain activities, measures, and undertakings to be done by the private sector; and

WHEREAS, the Government should provide protection to all persons and entities carrying out the economic development programs against the enforcement of certain requirements, orders and judgments of foreign authorities which operate to impose upon this nation their own economic policies, concepts and ideas; perpetuate the economic advantage of the industrial countries over the developing nations; favor foreign competitors; and embarrass, disrupt, or damage business carried on in the country;

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Republic of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order and decree:

SECTION 1. It is hereby declared a policy of the State that any and all documents and information possessed by or in the custody of the Philippine corporations, utilities or individuals doing business in the pursuit of the national

PREVIOUS PAGE WAS BLANK

economic development programs of the Government and/or engaged in the development, promotion, protection and export of Philippine products to increase foreign currency revenues, are vital to the national interest and should not be utilized by any foreign person or government to the prejudice and/or detriment of said corporations, entities or individuals, including their officers and employees.

SEC. 2. To implement this policy, no person shall take or cause to be taken, send or cause to be sent, or remove or caused to be removed from the territorial jurisdiction of the Philippines, or deliver in any manner or form to any foreign person or government or its agent or representative, any document or information as herein defined relating in any manner to any business carried on in the Philippines, unless such taking, sending or removal is consistent with and forms part of a regular practice of furnishing to a head office or parent company or organization outside of the Philippines, or is in connection with a proposed business transactions requiring the furnishing of the document or information, or is required or necessary for negotiations or conclusion of business transactions, or is in compliance with and international agreement, to which the Philippines is a party, or is made pursuant to the authority granted by the designated representative(s) of the President as herein described.

SEC. 3. For the purpose of this Decree, the term "document or information" shall include, but not be limited to, the originals (and all copies which are non-identical whether by means of notation or otherwise) of all written, printed, typed, recorded, graphic, or photographic matter, or any other type of memorial, formal or informal, located in the Philippines (including sound recordings and information stored in computers) whether or not in the possession, custody, or control of the person against whom the foreign requirement, order, direction, or subpoena is directed, including, but not limited to: telexes, records, books of ac-

count, reports, minutes, memoranda, telegrams, diaries, appointment books, log books, desk calendars, notes, inter-office or intra-office communications, bulletins, charts, circulars, maps, expense accounts, working papers, surveys, bid materials, stenographers' notebooks, sales reports, price lists, and all other writing and papers similar to the foregoing, however denominated, including any record or device by means of which material is recorded or stored, and resume, digest or extract of any such material.

SEC. 4. No action for enforcement of any foreign judgment rendered against Philippine corporation, entity or individual shall be entertained or given due course by any Philippine court or administrative body without prior written clearance from the designated representative(s) of the President in any of the following:

a) A judgment for multiple damages or for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor judgment is rendered arising out of an alleged anti-trust proceedings;

b) A judgment based on a provision or rule of law which relates to, or is concerned with, the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description, or otherwise relates to, or is concerned with, the promotion of competition;

A judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (a) or (b); or

c) Any proceeding in which any of the restricted documents or information has been made the basis of or used in evidence to support the judgment therein.

SEC. 5. Any person who is served or issued any requirement, order, directive or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside of the Philippines involving said documents or information shall inform the designated representative(s) of the President of the Philippines of such service/requirement who shall then determine whether or not compliance shall be made. For this purpose, the President of the Philippines shall promulgate rules, regulations and/or instructions necessary to carry and/or implement the objectives of this Decree.

SEC. 6. Any person who shall violate the provisions of this Decree or any order issued by the President/Prime Minister pursuant to this Decree shall, upon conviction, be punished by imprisonment of not more than three (3) years or a fine of not more than $100,000.00 or both, in the discretion of the court. In case the offender is a corporation, partnership or any juridical entity, the penalty shall be imposed on the officer or officers authorizing, permitting or tolerating the violation.

SEC. 7. All provisions of existing laws, orders, and regulations contrary to or inconsistent with this Decree are hereby repealed or modified accordingly.

SEC. 8. If, for any reason, any section or provision of this Decree is declared to be unconstitutional or invalid, the other sections or provisions of this Decree which are not affected thereby shall continue in full force and effect.

SEC. 9. This Decree shall take effect immediately.

Done in the City of Manila, this 21st day of August, in the year of Our Lord, nineteen hundred and eighty.

(sgd.) FERDINAND E. MARCOS
President of the Philippines